87-928

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

—o—

METZ BAKING COMPANY and BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #433,

Petitioners,

vs.

SELMAN (JOE) THOMAS, JR., *et al.*,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether a Union which represents two competing groups of employees breaches its duty of fair representation by choosing to remain neutral and to arbitrate their dispute rather than negotiate an agreement favorable to one group and detrimental to the other?

2. Whether a Union breaches its duty of fair representation at an arbitration by deciding not to present evidence which the Union believed was immaterial where a court later concludes such evidence was material?

3. If there is a violation of the duty of fair representation, should an arbitral award be vacated in favor of a jury verdict where there is no substantial reason to believe that any such breach tainted or undermined the integrity of the arbitral process?

PARTIES TO PROCEEDINGS BELOW

Parties to the proceedings below not listed in the caption consist of these individual respondents:

Lloyd Anderson; David Bell; Dale John Burk; Dennis Canterbury; John Conner; Curtis Cotton; Michael DeJaynes; Bessie Estell; Mary Louis Fillbach; Paul Flower; David Foster; Donald Froien; James George; Eddie Gill; Ivan Heesacker; Robert Hinsley Lewis Huston; Josephine James; Calvin Jewett; Ralph Johnson; Kent Jorgensen; Patricia Livengood; William Marsh; Clyde Moore; Percy Moore; James Nash; Robert Peters; John Pittman; Sylvio Rebolloso; Jane Reed; Wayne Shaffer; Paul Stone; James Thompson James Walker; Clayton Welch; Ishanwee Wrenn; Gerald Carew; Thomas Hayden and Melvin Wade, Jr.

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Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 17, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. B) is reported at 826 F.2d 755. That Court's subsequent denial of the Petitions for Rehearing and Rehearing en banc is not reported. (App. A) The opinion of the District Court (App. C) is not reported. The Arbitrator's decision and award (App. D) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App. B) was entered on August 17, 1987. A timely Petition for Rehearing was denied on September 24, 1987 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

For many years, Interstate Brands Corporation ("IBC") and Metz Baking Company ("Metz") operated bakeries in Omaha, Nebraska. By January of 1983 the bakery owned by IBC was a failing enterprise. IBC was operating the plant at a "substantial loss, which warranted a conclusion that if not disposed of, closure of the plant was probable, if not inevitable." (App. 49a) IBC therefore initiated negotiations with Metz to sell IBC's existing plant and facilities.

Metz was interested in IBC's Omaha facility because it was larger and more modern than the one owned by Metz. Metz also hoped to acquire certain other equipment and material owned by the IBC plant, but Metz did not need additional labor.

Metz already had an experienced and trained work force in the Omaha area which outnumbered the IBC work force. Metz employed 78 full-time bakery employees and 33 part-time employees working on a two and one-half shift basis. IBC employed only 41 full-time bakery employees and 21 part-time employees on a one shift per day basis. (App. 49a)

The bakery employees of both Metz and IBC were represented by the same Union—the Bakery, Confectionery, and Tobacco Workers Union, Local 433 (the "Union"). In addition, two other Unions (the Teamsters and the Operating Engineers) represented the remaining IBC employees.

Although the Union was aware that negotiations were proceeding between Metz and IBC regarding possible pur-

chase of the IBC facility, no requests for negotiation were made either by or on behalf of the Metz or IBC employees. Union President Clausen later testified that the Union decided to remain neutral and that it believed the matter would inevitably be arbitrated.

Even if negotiations had been requested, Metz did not intend to sacrifice the interests of its existing workers in favor of the workers from IBC—workers who faced imminent loss of jobs due to the impending closure of the IBC facility. Metz, in accordance with its past practice, was determined to treat the IBC workers as "new hires" and to "end-tail" them at the bottom of its own seniority list, thus protecting the existing Metz work force. (App. 50a-51a)

The negotiations resulted in sale of IBC's Omaha assets on February 19, 1983. The agreement between the two companies ("Sales Agreement") expressly provided: "Nothing contained herein shall be deemed or construed to require Buyer [Metz] to continue to employ any of the Transferred Employees [IBC workers] during any period following the Transfer Date." (App. 7a) The Sales Agreement contained no provision for IBC workers to obtain seniority over Metz workers after the purchase.

An identical industry-wide collective bargaining agreement covered both the Metz and IBC workers immediately before the sale. This agreement contained no provision for integration of employees in the event two work forces were combined. (App. 52a-53a)

Metz took possession of the plant, equipment, and customer routes of IBC in Omaha on February 21, 1983. On

that date it treated the IBC workers as "new hires" and "end-tailed" them. For a period of less than two weeks following the sale, Metz continued to operate both the Metz and the former IBC facilities in tandem—each with its own work force. On March 1, 1983, Metz sent out layoff notices to certain IBC workers who were at the bottom of the combined seniority list. On March 2, 1983, Metz combined operations and work forces at the former IBC facility, and the layoffs became effective.

On March 7, 1983, the Union filed a request for arbitration on behalf of the IBC employees. The other two Unions which represented IBC workers (the Teamsters and the Operating Engineers) did not request arbitration, nor had they earlier requested negotiation even though their members were similarly affected by "end-tailing" and the layoff process.

Prior to the Arbitration, the Union met separately with the competing IBC and Metz worker groups. The Union advised them that it would necessarily take a neutral position in the Arbitration, and further advised the groups that each could be represented by separate counsel. (App. 37a-38a)

At the Arbitration, all Union members from Metz and from IBC who wished to testify were permitted to do so, and no restrictions were placed upon their testimony. (App. 38a) One of the IBC workers later testified in the federal court proceedings that he had been told by a Union representative that a copy of the Sales Agreement would be present at the Arbitration. However, none of the IBC workers at the Arbitration testified about the necessity of producing or examining the Sales Agreement, nor did any

of the IBC workers request that it be produced or made a part of the record.

At the Arbitration, the Union's position was that Metz had assumed the contract between IBC and its workers, but the contract itself did not answer the questions of whether workers should be "end-tailed" or "dove-tailed" once integration of the work forces occurred.[1]

The Sales Agreement was not introduced because the Union attorney handling the arbitration did not believe it was material to the collective bargaining agreement which was the subject of the Arbitration. (App. 44a) He further testified that a review of the document following the Arbitration convinced him his position was correct.[2]

Metz presented evidence at the Arbitration that in treating employees of IBC as "new hires", it followed its past practice, as well as the practice of the industry as a whole. This evidence established that in numerous

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[1] The Union's position was that there was only one contract —"the industry contract"—which covered both sets of workers. As explained by the Union's attorney at trial: "The union took the position that Metz was obligated under both contracts equally, that one set of people had a right to follow their jobs and the other people were working at the same job they had had for years, so that we had a lot of dues payers, one having a set of rights and the other having a set of rights, and we had one contract, and that contract, contrary to a lot of other contracts, had no language on what happens if there's a merger of two groups, so there was no way to get to it except in arbitration." (R.146) ("R" refers to the Record filed with the Court of Appeals)

[2] The Union's attorney later testified at trial: " . . . [O]f course this was an asset sale, as I understood it and as I think the contract shows." (R.144) He further testified: " . . . [S]ubsequent to the Arbitration . . . I read the [sales] agreement and it is exactly what Mr. Lessman [of Metz] told me it was [an asset purchase]." (R.145)

other bakery route acquisitions by Metz from 1967 through 1980, all of the employees on such routes were considered new hires and were "end-tailed." (App. 51a)

Metz also introduced evidence that "dove-tailing" of the Metz and IBC seniority lists, as urged by the former IBC employees, would have discriminated against loyal Metz employees, and would have conferred a windfall on the former IBC employees who were facing the probable loss of their jobs because of the financial condition of IBC. (App. 51a)

At the close of the Arbitration, the Union's attorney, while maintaining a neutral position, presented a brief to the Arbitrator. It carefully discussed reasons and authorities which supported the position of each conflicting group. In this Brief, the Union's attorney specifically made the argument on behalf of the IBC workers that Metz had assumed the collective bargaining agreement with IBC. (App. 46a, n.2)

The Arbitrator[3] found that the actions of Metz did not violate the collective bargaining agreement. He noted that both Metz and IBC were parties to the same bargaining agreement with the Union, and that Metz had agreed to provide benefit seniority to the IBC workers. While that agreement contained provisions for plant-wide seniority with respect to filling jobs, layoffs, right to recall and other benefits, the contract did not contain any provisions defining the competitive seniority rights of employees where work forces were integrated or combined.

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[3] The Honorable James A. Doyle, an experienced and respected arbitrator and former Dean of Creighton University School of Law.

The Arbitrator also found that the case did not involve the acquisition of a "thriving business, but on the contrary, a failing enterprise." (App. 58a) He stated that integration of IBC employees on the Metz seniority list by "dovetailing" would have resulted in approximately three times as many Metz employees being laid off as former IBC employees, because the IBC employees had greater seniority than the Metz employees. While noting that "end-tailing" necessarily worked a "severe hardship on the employees of the financially troubled seller," he also noted that without the sale the "ultimate closing of the plant was imminent." (App. 59a) The grievance was therefore denied.

Following denial of the grievance, the affected IBC workers ("Plaintiffs") brought an action in the United States District Court for the District of Nebraska in which they alleged that the Union breached its duty of fair representation, and that Metz violated the collective bargaining agreement. IBC was not named as a Defendant.

Plaintiffs argued that the Union breached its duty in failing to negotiate with Metz and IBC with respect to preservation of IBC employees' jobs and seniority. Plaintiffs also argued that the Union mishandled the Arbitration proceedings, and, in particular, that the Union failed to introduce into the Arbitration proceedings a copy of the Sales Agreement between IBC and Metz—an agreement which Plaintiffs said conferred seniority rights upon them.

The Federal Court proceedings were bifurcated, and the issue of liability was tried to a jury. The jury found in favor of the Plaintiffs. Thereafter, the Federal Dis-

trict Judge[4] sustained the Defendants' Motions for Judgment Notwithstanding the Verdict, and set aside the jury verdict. In its decision, the District Court carefully reviewed the evidence and concluded that the Union did not breach its duty of fair representation by not negotiating. "[S]ince the [collective bargaining] contract was silent on the subject of assembling one work force from two bargaining units," arbitration was necessary. (App. 34a) Moreover, the collective bargaining agreement did not provide for renegotiation, and the Union had no reason to believe that it could force Metz to renegotiate seniority provisions or that it could renegotiate a more favorable position for Plaintiffs. Finally, since the Union was under a duty to represent all of its members, the jury could not properly have found that the Union breached a duty to negotiate with Metz to obtain more favorable treatment for Plaintiffs. (App. 34a)

The District Court also concluded that even had negotiation produced a result favorable to the IBC workers, any such result would necessarily have been submitted to the entire affected Union membership for majority approval. Since the IBC and Metz workers possessed antagonistic interests, and since the Metz group outnumbered the IBC unit by almost two to one, the Court concluded that such a proposal could not have been approved. (App. 36a)

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[4] Judge C. Arlen Beam who has now been nominated and confirmed as a member of the United States Court of Appeals for the Eighth Circuit.

The District Court also held there was no breach of the duty of fair representation in the way the Union handled the Arbitration. In reaching this conclusion, the Court discussed the manner in which the Union handled the Arbitration, and found that the "Union treated both the IBC employees and the Metz employees fairly and with substantial equality." (App. 39a)

The District Court further reasoned that mere failure to perceive a legal theory was at most negligence. Although one of the IBC workers was told the Sales Agreement would be at the Arbitration, the evidence indicated that it was not introduced because the Union attorney who handled the Arbitration simply did not believe it was material. The District Court concluded that this was at most poor judgment, but no violation of the duty of fair representation. (App. 43a)

Finally, the District Court concluded that there had been no "taint" of the arbitral process because the Arbitrator knew of the sale, and knew of the interpretation placed on the Sales Agreement by the IBC workers. The Arbitrator could have asked for a copy of the Sales Agreement. However, even if the Sales Agreement required Metz to assume the IBC collective bargaining contract in full, that contract made no provision for integration of work forces—the very issue decided by the Arbitrator. (App. 46a)

The decision of the District Court was appealed to the Eighth Circuit Court of Appeals. That Court, by a 2-1

panel ruling,[5] reversed the District Court and ordered the jury verdict reinstated. The majority opinion found that there were instances of conflicts in testimony, and concluded that the jury could have found in these instances that the Union representative was untruthful and there was "bad faith." (App. 13a, 17a) Having decided that the jury could have found "bad faith", the Court of Appeals reasoned that failure to negotiate and failure to present the Sales Agreement at the Arbitration each constituted a violation of the duty of fair representation. The Court does not explain how failure to negotiate tainted the arbitral process, but does conclude that the arbitral process was tainted because the Sales Agreement was an "essential" piece of evidence which was not presented to the Arbitrator. (App. 21a)

Judge Henley's concurring and dissenting opinion[6] focused on the absence of a causal relationship between failure to negotiate and any injury to Plaintiffs. He particularly noted that any agreement would necessarily have been submitted to a majority vote of affected IBC and Metz Union members, and the Metz workers would simply have outvoted the outnumbered IBC workers. (App. 24a)

On the subject of the sales agreement, Judge Henley found at most negligence in failing to present it to the

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[5] The panel consisted of Circuit Judge Arnold and Senior Circuit Judge Henley, both of the Eighth Circuit. In addition, Senior Judge Wright sat by designation from the Ninth Circuit. Judges Arnold and Wright joined in the majority opinion, with Judge Henley concurring and dissenting.

[6] Judge Henley concurred in the majority's conclusion that the motions for new trial should have been denied and that a jury could have found that the Union representative made certain misrepresentations, but dissented from the majority's conclusion that the district court should be reversed.

Arbitrator. Even if it had been presented, however, and even if the Arbitrator decided that the IBC contract was assumed by Metz, this did not decide the fundamental issue of what happened upon integration of the work forces—an issue not addressed in the collective bargaining agreement. (App. 25a-26a)

Following the issuance of the Court of Appeals decision, Petitioners each filed a Petition for Rehearing and for Rehearing En Banc. These Petitions were denied on September 24, 1987.

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REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH PRIOR SUPREME COURT PRECEDENT AND FEDERAL LABOR RELATIONS POLICY NARROWLY DEFINING WHAT CONSTITUTES A VIOLATION OF THE DUTY OF FAIR REPRESENTATION SUFFICIENT TO VACATE AN ARBITRAL AWARD.

This case raises important issues involving the finality of arbitral awards and the scope of a union's duty of fair representation. The Eighth Circuit's decision vacates an arbitral award in favor of a subsequent jury verdict where: (1) There was no substantial evidence that the Union's conduct was arbitrary, discriminatory, or in bad faith; and (2) There was no substantial reason to believe that the Union's conduct tainted or undermined the integrity of the arbitral award. Petitioners respectfully urge that this Court review the Eighth Circuit's decision and provide guidance on these important recurring questions.

The "overarching legislative goal" of our national labor laws is to facilitate collective bargaining and to

achieve industrial peace in the workplace. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979); § 1 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 (1947). Over the last thirty years this Court has consistently reminded the federal judiciary that "the substantive law to apply in suits under § 301(a) [of the NLRA] is federal law which the courts must fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). A critical part of this policy is the Congressional mandate that parties must be permitted mutually to resolve their industrial disputes. § 203(d) of the NLRA, 29 U.S.C. § 173(d) (1947).

The keystone of this federal law of labor relations is the enforcement of agreements by unions and employers to arbitrate their industrial disputes. When arbitration has been agreed upon by the parties, it can be effectuated, "[o]nly if the means chosen by the parties for settlement of their difference under a collective bargaining agreement is given full play." *United Steel Workers of America v. American Manufacturing Company*, 363 U.S. 564, 566 (1960). Because the arbitrator's resolution of the dispute takes into account not only the express provisions of the contract but also the "industrial common law—the practices of the industry in the shop," it is vital to preserve the arbitrator's decision. *United Steelworkers of America v. Warrior & G. Nav. Co.*, 363 U.S. 574, 582 (1960). "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance because he cannot be similarly informed." *Ibid.* Justice Douglas summarized the strong policy underlying this law when he wrote:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

A narrow exception to the policy of finality of arbitral awards has been allowed in those cases where the duty of fair representation has been violated due to arbitrary, discriminatory, or bad faith conduct on the part of a union. *Vaca v. Sipes*, 386 U.S. 171 (1967). Only in the most egregious cases has this Court chosen to upset arbitral finality based upon a union's violation of the duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) illustrates such an egregious case. In that case employees, who had been terminated based upon false evidence, were given remedies against both union and employer where the union apparently could have discovered the falsity of the charges with a minimum of investigation and where the union's breach of duty tainted the arbitral process.

The policy of arbitral finality remains firmly embedded in the law today as this Court recently affirmed:

> "These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability." *A T & T Technologies v. Communications Workers of Am.*, 475 U.S. 643, —, 106 S. Ct. 1415, 1418 (1986)

The policy favoring finality of arbitral decisions is augmented by a parallel policy of deference to union decisions concerning representation of members. This Court has repeatedly held that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents . . ." *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). In negotiating as well as administering collective bargaining contracts, the union's broad authority is "undoubted." *Humphrey v. Moore*, 375 U.S. 335 (1964).

The Eighth Circuit's opinion in this case eviscerates the policy of deference to the decision of a mutually selected arbitrator by choosing instead to enforce a contrary jury award. In addition, the opinion violates the federal policy of according wide latitude to unions in their manner of representation by holding a union liable for failing to negotiate and for not introducing a particular piece of evidence. The effect of the Eighth Circuit decision strips the majority group of affected employees (the Metz workers), the Union, and Metz of the benefit of the Arbitrator's award and the protection of federal law. Further, it subjects the Metz workers to potential layoffs and loss of jobs, and exposes the Union and Metz to the possibility of extensive claims for damages.

Because this case vividly illustrates the dangers involved in upsetting the finality of arbitral awards and in restricting the manner of representation and because it improperly broadens what constitutes a violation of the duty of fair representation, this writ should be granted.

The decision of the Eighth Circuit concludes that the Union violated its duty of fair representation in

two particulars: first, the Union failed to negotiate; second, the Union mishandled the arbitration itself by failing to present to the Arbitrator a copy of the Sales Agreement between Metz and IBC.

With respect to the "negotiations" violation, the Eighth Circuit decision cites only one example of a conflict in testimony and concludes that based upon this conflict a jury could have found "misrepresentation" and "bad faith". Specifically, the Court cites a conflict between testimony of three different witnesses. Lessman (Vice President and General Counsel of Metz) testified that he advised Clausen (Union President) one or two days after the date of sale (February 19, 1983) that the IBC workers would be regarded as "new hires." Clausen denied this. One of the Plaintiffs, Walker, then testified that "near the end of February" Clausen told him that, "We should have—we had our jobs, 'don't worry,' we had our jobs."[7]

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[7] The Eighth Circuit overlooks Clausen's explanation of why the Union had not requested "negotiation." Clausen testified that the Union knew this matter would end up in Arbitration. Therefore, negotiations would have been futile. In addition, Clausen also stated the Union was attempting to remain neutral. Upon being asked whether the Union requested negotiations with Metz prior to the Arbitration, Clausen said, "No. We were—it was hardly little the Union could do. No matter which way we went, you know, we had to go to Arbitration or we would finally probably wind up here in court anyway. We couldn't take either side . . ." (R. 126)

The Eighth Circuit fails to apply or even articulate the "substantial evidence" test for violation of the duty of fair representation as set out in *Humphrey v. Moore*, *supra* at 348. In that case a union president made a strikingly similar representation when he told a group of workers that they had "nothing to worry about" since a competing group of transferring workers had no contractual rights. The workers to whom the representation was made in *Humphrey* were not advised until immediately before the arbitration that the union had changed its mind. In fact, at arbitration the union argued that the transferred workers should be "dove-tailed" with a consequent loss of jobs among those workers who had been told they had "nothing to worry about." This Court concluded: "There is no *substantial evidence* of fraud, deceitful action, or dishonest conduct." 375 U.S. at 348. (emphasis supplied)

Even if this single conflict in testimony was "substantial evidence" of bad faith sufficient to constitute a violation of the duty of fair representation, there must also be a taint or undermining of the integrity of the arbitral process, or else the arbitral result will be final. *Hines v. Anchor Motor Freight, Inc.*, *supra* at 567, 572. The Eighth Circuit opinion does not explain why there is a taint of or undermining of the arbitral process because of the Union's decision not to negotiate. However, the District Court's opinion discusses at length the absence of such taint. The District Court found that the absence of Plaintiffs' evidence on this point was fatal to their contention, and then noted the following facts demonstrating an absence of causal connection between lack of nego-

tation and harm to Plaintiffs: the subsequent arbitration; the uncontroverted testimony of Metz that it would not have "dove-tailed,"[8] the fact that any agreement must be submitted to majority approval and the Metz workers would simply have outvoted the outnumbered IBC workers.

The Eighth Circuit's response to those arguments was generally that it was not possible to determine from the record how a vote would have turned out, but, in any event, the question of causation was an issue only with regard to damages and not a question relevant to determination of liability: "That negotiation would have been futile does not negate the Union's liability for bad-faith failure to negotiate." (App. 24a)

This attempt to separate the issue of causation from liability and apply it only to the question of damages violates prior federal law and policy requiring causation as an element of liability. *Humphrey v. Moore, supra,* specifically rejects such a separation: "Idle speculation . . . that the result would have been different had the matter been differently presented" is not sufficient to find a breach of the duty of fair representation. 375 U.S. at 351.

The decision of the Eighth Circuit also held that the Union violated its duty of fair representation in the way

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[8] The position of Metz is in accordance with the law in a successorship setting providing that an employer " '[i]s ordinarily free to set initial terms on which it will hire the employees of a predecessor,' [citation omitted], and it is not bound by the substantive provisions of the predecessor's collective bargaining agreement . . ." *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 107 S.Ct. 2225, 55 U.S.L.W. 4706 (1987). Even if negotiations were required or had been conducted, Metz was not required to agree to any particular result. *H.K. Porter v. N.L.R.B.*, 397 U.S. 99 (1970).

it conducted the Arbitration. The Circuit Court found that the jury could have concluded there was "bad faith" or dishonesty on the part of the Union because of another testimonial conflict between Clausen and Walker. At one point Clausen advised Walker that the Sales Agreement would be present at the Arbitration. The Circuit Court concluded that Clausen might have lied when he said this.[9]

Clearly this is not the "substantial evidence" of a violation of the duty of fair representation required by *Humphrey v. Moore, supra.* In fact, the Union's careful attempt to maintain neutrality and its conclusion that the Sales Agreement was immaterial fall well within the broad latitude given unions. See *Ford Motor Co. v. Huffman, supra. Vaca v. Sipes, supra,* holds that a union does not violate its duty of fair representation merely because it fails to take even a meritorious claim to arbitration. In this case the claim was taken to arbitration and this Union undertook a substantially greater effort than the union in *Vaca*—a union which this Court concluded did not violate its duty of fair representation as a matter of law.

Nor did the Eighth Circuit recognize or apply the test in *Hines v. Anchor Motor Freight, Inc., supra. Hines* states that where there has been arbitration the focus shifts from "the reasons for the Union's failure to act" to the question of whether there is "substantial reason to believe that a union's breach of duty contributed to the erroneous outcome of the contractual proceedings." 424 U.S. at 568.

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[9] This was not literally a misrepresentation since, as a matter of record, there was no evidence on the subject of whether the Sales Agreement was "present" at the Arbitration—although concededly it was not introduced.

There is no "substantial reason" to believe the Union's conduct contributed to any "erroneous outcome" of the Arbitration—even assuming *arguendo* that such outcome was erroneous. The only claim that the outcome might have been affected was the Circuit Court's contention that the "Sales Agreement" was an "essential" piece of evidence. Even if Metz had specifically elected to favor the IBC workers in the "Sales Agreement" this would not have been binding upon either the IBC or the Metz workers unless it was incorporated within the collective bargaining agreement. As the Arbitrator stated in this case, the Arbitrator's decision must draw its essence from the collective bargaining agreements. *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra* at 598-599.

In any event, neither the Sales Agreement nor the collective bargaining agreements which covered the Metz and IBC work forces contained provisions for integration or merger of two separate work forces.[10] As Judge Henley

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[10] In the present case, the Arbitrator did find that Metz agreed to recognize benefit seniority rights of IBC employees, but had not agreed to recognize competitive seniority rights. (App. 58a) This distinction between benefit seniority rights (the right to use seniority for the purposes of calculating benefits such as vacations, pensions, and other fringe benefits) and competitive seniority (the determining of the order in which employees may bid on particular jobs, are laid off, or recalled to work) is a distinction which is firmly established in the common law of the industrial setting and which this Court has previously recognized as a bona fide seniority system in the context of Title VII of the Civil Rights Act of 1964. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 343-44 (1977). This is one of the important aspects of our specialized common law of the work place that this Court has held is appropriately determined by an arbitrator and ill-suited for determination by a jury or court in accordance with our federal principles of collective bargaining and industrial peace in the work place. *United Steelworkers of America v. Warrior & G. Nav. Co.,* 363 U.S. 574, 581-2 (1960).

wrote in his dissent, the Sales Agreement "conferred no greater rights than the bargaining agreements, and the arbitrator ruled that those agreements did not dispose of the issue." (App. 26a) Where Plaintiffs did not demonstrate that the Union's failure to introduce the Sales Agreement harmed them, "there can be no liability." (App. 26a)

Accordingly, the decision of the Eighth Circuit is in conflict with the prior decisions of this Court and the federal policy of labor law favoring enforcement of arbitral decisions.

II. THE DECISION OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AS TO WHAT CONSTITUTES A VIOLATION OF THE DUTY OF FAIR REPRESENTATION AND WHAT IS REQUIRED BEFORE A PRIOR ARBITRAL AWARD IS VACATED.

The current Eighth Circuit's position is now in direct conflict with at least five other Circuits concerning what constitutes a violation of the duty of fair representation, and whether a nexus is required between any such violation and a "taint" or "undermining" of the arbitral process before that process is vacated.

In *Wood v. International Brotherhood of Teamsters*, 807 F.2d 493 (6th Cir. 1986), *cert. den.* 107 S.Ct. 3232 (1987) employees in a warehouse were not hired by the new employer. The former employees along with their union filed a grievance, and it was carried to arbitration. The arbitrator found for the new employer. The former employees then filed an action similar to the present one in which they alleged, *inter alia,* that their union had breached its duty of fair representation. As in this case, the trial was bifurcated.

After the presentation of evidence, the district court dismissed the new employer, but the former employer and the union remained defendants. A jury verdict was then returned against both the former employer and the union. Unlike the present case, the district court denied the motions for judgment notwithstanding the verdict.

The United States Court of Appeals for the Sixth Circuit affirmed the dismissal of the former employer, and reversed the remainder of the district court judgment with directions to confirm the arbitration award. The *Wood* case reached an opposite result from the Eighth Circuit on virtually identical facts. The Eighth Circuit gives great weight to a jury verdict—"construing this evidence and all reasonable inferences from it in favor of plaintiffs, as we must . . ." (App. 10a)—without recognizing the tension between the jury verdict and the arbitral award. The Sixth Circuit properly defers to the arbitral award:

> "A court may not review the merits of an arbitration decision, even when the basis for the decision is ambiguous, as long as the award draws its essence from the bargaining agreement . . . Even in the event of a union's breach of its duty of fair representation, an arbitration award is not quickly set aside." 807 F.2d at 500.

In the *Wood* case, plaintiffs made allegations similar to those in the present case concerning the union's failure to represent them properly while negotiations were under way between the two companies: "They claim, among other things, that the union . . . failed to make reasonable efforts to require Hammaty [new employer] to honor the

contract . . .'' 807 F.2d at 502-503. In rejecting this claim, the Sixth Circuit first noted that plaintiffs had a duty to establish that the new employer would have adopted the contract and that, ''they [plaintiffs] would not have been injured had the union not breached its duty.'' 807 F.2d at 503. The Eighth Circuit ruled that this was an issue which was causal only to the issue of damages. The Sixth Circuit properly concluded causation was required for a finding of liability, and that mere speculation on this issue could not establish a violation of the duty of fair representation:

> ''We can only speculate whether Hammaty [new employer] would have hired the employees by seniority in accordance with the contract if the union had performed all the acts and refrained from all the acts which Plaintiffs claim it should have. Plaintiffs presented no evidence to establish this causal connection between the union's alleged breach and their alleged injuries.'' 807 F.2d 493.

The position of the Sixth Circuit was exactly the position of District Judge Beam, and that of Judge Henley on the Eighth Circuit. As Judge Henley wrote: ''If there is no showing of probable injury, failure to negotiate should not call for reversal and remand for determination of a remedy.'' (App. 24a) *See also, Self v. Drivers, Chauffeurs, Warehouses, Etc.*, 620 F.2d 439 (4th Cir. 1980) wherein a district court's judgment in favor of discharged employees was reversed for failure to prove causation: ''. . . [t]here was no showing that the Plaintiffs' dismissal would not have stood even had the Union done its duty and pressed their case more zealously.'' 620 F.2d at 443-444.

Plaintiffs in *Wood* just as Plaintiffs here, criticized the union's actions during the course of the arbitration asserting a breach of the duty of fair representation. The Eighth Circuit found in the present case that it was sufficient to overturn the arbitral process if it was demonstrated that the "chances" of Plaintiffs at Arbitration "would have been much greater with the Sales Agreement." (App. 21a) The Sixth Circuit in *Wood* imposed a far more rigorous standard upon plaintiffs when it concluded that even if the basis for an arbitrator's decision is "ambiguous", it may not be reviewed when it draws its essence from the bargaining agreement. Where the alleged breach of the duty of fair representation relates to the arbitration itself, the Sixth Circuit found, "An employee will not be entitled to recover from a union if a union's breach did not lead to injury." 807 F.2d at 502.

The Eighth Circuit's decision below also conflicts with the Sixth Circuit's opinion in *Morris v. Werner-Continental, Inc.*, 466 F.2d 1185 (6th Cir.), *cert. denied*, 411 U.S. 965 (1972). The Eighth Circuit decision set aside the arbitral decision and award based upon possible inferences of bad faith. In *Morris*, the Sixth Circuit decision specifically found that one of the companies involved in a purchase or merger transaction, in which the subject of "dovetailing" or "end-tailing" was involved, engaged in "deception" of one group of the affected workers. 466 F.2d at 1198. Despite the company's deception, and despite the fact that the arbitral process in *Morris* (which consisted of submitting the dispute to the Ohio Joint State Committee—O.J.S.C.) reached a result which was contrary to what the Sixth Circuit believed the law to be, the court none-

theless felt constrained to give effect to the arbitral process:

> "It is extremely difficult for us to see how the O.J.S.C. could translate or transform the merger that actually took place into a purchase. However, perhaps unfortunately for the Continental drivers, but, also, fortunately for the promotion of industrial peace in general, it is not our place to decide this issue, nor was it the function of the trial court." 466 F.2d at 1190.

Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3rd Cir.), *cert. denied*, 434 U.S. 837 (1977), is in direct conflict with the Eighth Circuit decision on the issue of whether misrepresentation or bad faith alone constitutes a violation of the duty of fair representation with attendant liability. The Eighth Circuit states that "bad faith" is a violation of the duty of fair representation, even though had the duty been discharged bargaining might have been futile. (App. 13a) The Third Circuit in *Deboles* takes the opposite view. In reviewing what were concededly "deliberate misstatements" (a "web of deceit" from 1966 to 1970) the *Deboles* Court concluded: " . . . [F]alse statements may not create liability under the federal labor laws absent a showing of tangible injury proximately resulting from the falsehood." 552 F.2d at 1017. The court added that where such misrepresentation "did not materially affect the result of the subsequent ratification vote," there could be no liability. 552 F.2d at 1019-20.

The decision of the Eighth Circuit is also in conflict with the Ninth Circuit's decisions in both *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480 (9th Cir. 1985), and *Acri v. International Association of Machinists*, 781 F.2d 1393 (9th

Cir.), *cert. denied* 107 S.Ct. 73 (1986). In *Castelli v. Douglas Aircraft Co., supra,* the Ninth Circuit affirmed a district court judge's grant of summary judgment in favor of a union where the union spent only one and a half hours in investigation and preparation for arbitration, and where, as in this case, allegedly vital information was not presented to the arbitrator.

In upholding the grant of summary judgment the Ninth Circuit held that "mere negligence" on the part of a union does not constitute a breach of the union's duty. Courts should interfere with union decisions about employee grievances only if the union shows "reckless disregard" for the rights of an employee. 752 F.2d at 1482. The court found that failures to present evidence were at most "tactical errors" which did not rise to the level of "egregious disregard to union members' rights" which would constitute a breach of the union's duty of fair representation. 752 F.2d at 1483.

Acri v. International Association of Machinists, supra, conflicts with the Eighth Circuit's opinion of what is sufficient to constitute proof of violation of the duty of fair representation in negotiation. The Eighth Circuit decision sidesteps the issue of what would have occurred if the Union had requested to negotiate on behalf of the IBC workers with Metz, while ignoring the uncontroverted evidence that Metz did not regard the issue of "end-tailing" as an issue upon which it would compromise. The Ninth Circuit finds that without such evidence there is no breach of the duty of fair representation:

> "Plaintiffs must establish a causal relationship between the alleged misrepresentations and their injury

> . . . In this context, causation would be established by proof that (1) the vote to ratify would have been different had the misrepresentations not been made; and (2) that the company would have acceded to Union demands had the vote been different . . ." 781 F.2d at 1397.

Since the plaintiffs in *Acri* could not establish that the company would have given in to their demand to remove a severance pay limit, plaintiffs could not establish a violation of the duty of fair representation and summary judgment was appropriate. *Id.*

In his concurring opinion in *Acri*, Circuit Judge Reinhardt specifically commented on the very heavy burden upon plaintiffs in "failure-to-bargain" cases. He concluded that the rule making fair representation suits "impractical" was a desirable one because negotiation of labor contracts is difficult enough, "without the additional threat of lawsuits from unhappy union members, with the attendant possibility of personal liability." 781 F.2d at 1399.

The Eighth Circuit's broad interpretation of what can constitute a violation of the duty of fair representation is contrary to the narrow standard adopted by the Seventh Circuit. In *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir.), *cert. denied* 106 S.Ct. 3282 (1986), a discharged employee alleged failure on the part of the union to represent him properly before a grievance proceeding. Specifically, the employee alleged that the union had not prepared for a grievance hearing, by not discovering the absence of a formal policy on the part of the employer governing the situation in question, and by failing to in-

vestigate any of the facts underlying earlier incidents involving the same employee. The court found for the union.

The Seventh Circuit followed its earlier decision in *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981). *Hoffman,* requires proof of "intentional misconduct" in any suit attacking the adequacy of Union representation.[11] 786 F.2d at 243-244. That court defended this more restrictive standard, "[b]ecause any other approach would embroil the courts in the merits of employment decisions." 786 F.2d at 244. Since the parties "have bargained for non-judicial decisions," they are "entitled to rely on the decisions they receive." 786 F.2d at 244.

The Eighth Circuit permits a jury to have the "last word" in an arbitrated labor dispute by finding "bad faith" on the slightest of conflicts in testimony and by failing to require that Plaintiffs establish "taint" or undermining of the arbitral process.

Because of these conflicts which the Eighth Circuit's decision raises with the decisions of the Third, Fourth, Sixth, Seventh and Ninth Circuits, this writ should be granted.

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[11] Judge Easterbrook's decision in *Camacho* specifically suggests that the subject of what constitutes a violation of the duty of fair representation is an issue ripe for Supreme Court determination: "One day the Supreme Court will resolve these recurring differences, which have called forth at least ten published majority opinions plus several concurring and dissenting opinions in this Circuit alone since 1981." 786 F.2d at 246.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 86-2214NE

Selman (Joe) Thomas, Jr., et al	)	
	)	
Appellants,	)	Appeal from the United States District Court for the District of Nebraska
	)	
vs.	)	
	)	
Bakery, Confectionery and Tobacco Workers Union, etc. et al,	)	
	)	
	)	
Appellees.	)	

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

September 24, 1987

Order entered at the direction of the Court;

Clerk, United States Court of Appeals, Eighth Circuit.

APPENDIX B

Selman (Joe) THOMAS, Jr.; Lloyd Anderson; David Bell; Dale John Burk; Dennis Canterbury; John Conner; Curtis Cotton; Michael DeJaynes; Bessie Estell; Mary Louis Fillbach; Paul Flower; David Foster; Donald Froien; James George; Eddie Gill; Ivan Heesacker; Robert Hinsley; Lewis Huston; Josephine James; Calvin Jewett; Ralph Johnson; Kent Jorgensen; Patricia Livengood; William Marsh; Clyde Moore; Percy Moore; James Nash; Robert Peters; John Pittman; Sylvio Rebolloso; Jane Reed; Wayne Shaffer; Paul Stone; James Thompson; James Walker; Clayton Welch; Ishanwee Wrenn; Gerald Carew; Thomas Hayden and Melvin Wade, Jr., Appellants,

v.

BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL # 433 and Metz Baking Company, Appellees.

No. 86-2214.

United States Court of Appeals,
Eighth Circuit.

Submitted May 15, 1987.

Decided Aug. 17, 1987.

Before ARNOLD, Circuit Judge,
WRIGHT* and HENLEY, Senior Circuit Judges.

ARNOLD, Circuit Judge.

In this action, plaintiffs are former employees of Interstate Brands Corporation ("IBC"), a bakery. In February 1983, defendant Metz Baking Company, a competitor of IBC, bought most of IBC's assets, including the plant on Leavenworth Street in Omaha, Nebraska, where plaintiffs worked. After the sale, Metz employed plaintiffs at the Leavenworth bakery for two weeks, until it closed down the other bakery it operated in Omaha, on Nicholas Street, and transferred the Nicholas Street employees (who were represented by the same union that represented the former IBC employees, defendant Local No. 433 of the Bakery, Confectionery, and Tobacco Workers Union) to the Leavenworth plant. Metz then "end-tailed" the former IBC employees, which means it placed them at the bottom of the plantwide seniority list, after most of the Nicholas Street employees, for purposes of lay-offs. Of course, since Metz had two full complements of employees assigned to the Leavenworth plant after the transfers, lay-offs were immediately necessary, and the plaintiffs were laid off.

*The Hon. Eugene A. Wright, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

After unsuccessfully taking their layoffs to arbitration, plaintiffs sued the Union for violating its duty of fair representation and Metz for breaking the collective-bargaining agreement it had with plaintiffs. The trial was bifurcated. The question of liability was first submitted to the jury on special interrogatories, with the idea that relief would be determined at a later stage of the case if the jury should find defendants liable. The jury did find in favor of plaintiffs, but the District Court granted judgment n.o.v. for defendants and, in the alternative, denied defendants' motion for a new trial. Plaintiffs appeal the judgment n.o.v., and defendants claim error in the denial of their alternative motion for a new trial. We hold that the District Court erred in granting judgment n.o.v. but was correct in denying the new trial; therefore we direct that judgment be entered on the jury's verdict, and remand for determination of appropriate remedies.

I.

The Union represented both groups of employees involved here, as well as other bakery workers, and it had negotiated a single collective-bargaining agreement, on behalf of all its members, with IBC, Metz, and another baking company. But although there was only one written contract, the words of that contract represented separate labor agreements running between each employer and the individual bargaining units of that employer's workers. And each separate plant comprised an independent bargaining unit. Thus, before Metz bought IBC's assets, there was one agreement governing labor relations between IBC and its Leavenworth employees, and another between Metz and its Nicholas employees, and the terms of the two agreements were identical.

The labor agreement, in effect from May 2, 1982, until May 5, 1985, provided in part:

ARTICLE X

SENIORITY

* * * * * *

> Section 4. In the event it becomes necessary to reduce the working force for the lack of business or other legitimate reasons, the last person hired in the plant shall be the first person laid off. . . .

P.Ex. 2, at 3-4. The agreement also stated: "This Agreement and the provisions herein contained shall be binding upon the parties hereto, their heirs, successors or assigns." *Id.* at 18.

In February 1983, when Metz agreed to buy IBC's assets, Metz and IBC recorded their agreement in a lengthy purchase contract. Among the assets that IBC agreed to transfer to Metz were:

> [Section 1.1) (c) All of the rights of [IBC] in, to and under the contracts and commitments described in Exhibit D hereto; provided, however, that such contracts and commitments shall be assigned to [Metz] subject to all of the terms thereof....

P.Ex. 1, at 2. Exhibit D to the purchase agreement described the collective-bargaining agreement between IBC and its Leavenworth employees. In turn, Metz agreed to

> [Section 3.1](c) the assumption by [Metz] of the liabilities and obligations of [IBC] under the realty leases, contracts and commitments referred to in Sections 1.1 (b) and (c) hereof.

Id. at 5. Metz and IBC also agreed that payment of the purchase price would be made in part

> [Section 3.2](b) by the delivery to [IBC] of a written undertaking . . . whereby [Metz] agrees to assume, pay, perform, satisfy and discharge the unfulfilled portion . . . of any and all duties, obligations and liabilities of [IBC] under the realty leases, contracts and commitments identified in Exhibits C and D hereto[.]

Ibid.

In addition to these provisions regarding the rights and duties that Metz would assume from IBC, the purchase agreement also provided for the "transfer" of employees from IBC to Metz.

Section 10. Transferred Employees.

10.1 All of Seller's employees who are primarily engaged in the conduct of the Subject Operations as of the Transfer Date shall become employees of Buyer on the Transfer date (the "Transferred Employees"), and Buyer shall become the successor employer under, and shall use its best efforts to obtain novations with respect to, each of the collective bargaining agreements identified in Exhibit D hereto. Seller agrees to make full and final settlement with the Transferred Employees, as of the Transfer Date, with respect to wages, salaries, union dues, contributions to welfare and employee benefit plans, payroll taxes, premium pay and all other obligations relating to their employment by Seller, to and including the Transfer Date, except for the accrued vacation rights, if any, of the Transferred Employees, which rights Buyer agrees to recognize and honor subsequent to the Transfer Date, and except for contingent work week credits not yet due and payable.

• • • • • •

10.3 Notwithstanding the foregoing, in the event that any claim is made against Seller, by reason of Seller having been a party to any of the collective bargaining agreements identified in Exhbit D hereto, or for severence or termination pay under or pursuant to any of said agreements by reason of the transfer of any employees to Buyer, the termination of any of the Transferred Employees by Buyer or the termination of any employees by Seller at the request of Buyer, Buyer shall indemnify and save Seller harmless from and against all such claims, including all costs and expenses of defending against any such claims and any and all liabilities arising therefrom. Nothing contained herein shall be deemed or construed to require Buyer to continue to employ any of the Transferred

> Employees during any period following the Transfer Date.

Id. at 13-14.

When Metz closed the purchase on February 19, 1983, it took on the former IBC employees and treated them as "new hires" as of that date, which destroyed their previous seniority with IBC and made them junior to all of Metz's Nicholas Street employees who had been hired before them. Plaintiffs' claim against Metz rests on the effect of the purchase agreement: If Metz agreed to assume IBC's duties under the IBC-Leavenworth Street labor contract, then Metz was obliged to recognize the seniority plaintiffs had with IBC, and Metz could not treat them as new hires in February 1983, nor end-tail them to the Nicholas Street workers.

But plaintiffs have already presented this claim in arbitration, and the arbitrator ruled against them. This presents an obstacle to review of plaintiffs' claim in federal court, for plaintiffs are party to a labor contract with Metz (Metz agrees that it assumed IBC's labor agreement with the Leavenworth workers, but argues that this assumption did not include the seniority rights of the former IBC workers), and the labor contract states that claims such as plaintiffs' will be arbitrated, and that the arbitrator's decision will be binding on all the parties. In these circumstances, Metz is entitled to rely on the arbitrator's award as a bar to subsequent litigation of the claim unless the plaintiffs prove that the arbitration "process has fundamentally malfunctioned by reason of the bad-faith performance of the union," *Hines v. Anchor Motor Freight*, 424 U.S. 554, 569, 96 S.Ct. 1048, 1058, 47 L.Ed.2d 231

(1976), in which case plaintiffs can avoid the bar. This requires that plaintiffs show that the Union violated its duty of fair representation and that this breach tainted or "seriously undermine[d] the integrity of the arbitral process." *Id.* at 567, 96 S.Ct. at 1058.

Therefore the immediate focus in this case is to determine whether there was a breach of the duty of fair representation; if not, then the entire case is over, because the Union has no liability and the arbitrator's award must stand. If the duty was violated, then it must be determined whether the breach tainted the arbitration; if not, Metz must win because it will be entitled to rely on the arbitrator's decision. This was the approach taken by the District Court in its conscientious consideration of the motion for judgment n.o.v., and it ruled that the evidence was insufficient as a matter of law to establish either that the Union violated its fair-representation duty or that any such breach tainted the arbitration, and, accordingly, entered judgment n.o.v. for both defendants without reaching plaintiffs' claim against Metz. To those rulings we now turn.

II.

Plaintiffs alleged that the Union violated the duty of fair representation in two respects: first, by not negotiating with Metz to protect their seniority rights at the time of the sale, and second, by not representing their interests fairly at the arbitration. To establish a violation of the statutory duty of fair representation, plaintiffs must show that the Union was hostile, discriminatory, perfunctory, arbitrary, or dishonest, or acted in bad faith in representing their interests. See *Vaca v. Sipes*, 386 U.S. 171, 188-95,

87 S.Ct. 903, 915-19, 17 L.Ed.2d 842 (1967). To hold the Union liable for damages on proof that it was any less culpable would infringe on the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it represents . . ." *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953).

A.

On their first theory, plaintiffs produced the testimony of Marlin Lessmann, Metz's general counsel, that he told Bernard Clausen, the president of Local 433, within one or two days of the purchase that Metz considered plaintiffs to be newly hired as of February 19, 1983. Tr. I:75-76. Clausen denied this. Both testified that Lessmann informed the Union that Metz intended to operate the Leavenworth plant and the Nicholas plant in tandem for a time after the purchase, and Lessmann stated that he told Claussen that there probably would be a consolidation in the near future. Tr. I:91. One plaintiff, James Walker, testified that near the end of February he asked Clausen what was going on in relation to the sale of the Leavenworth plant, and "[Clausen] said we should have—we had our jobs, 'Don't worry,' we had our jobs." Tr. I:181.

Construing this evidence and all reasonable inferences from it in favor of plaintiffs, as we must, the jury could have credited Lessman's and Walker's testimony and found that Clausen knew that Metz considered plaintiffs to be new hires, and that it contemplated consolidating the two plants, but told one of plaintiffs not to worry about his job. The jury could have inferred from this that Clausen knew that plaintiffs' jobs were at risk, refused to nego-

tiate to protect their interests, and then lied to one of them about their precarious situation. This is sufficient to establish a violation of the fair-representation duty.

The District Court noted this evidence, but held that other evidence and factors made the jury finding unsupportable. First, it found this finding inconsistent with the jury's additional finding that Metz agreed to assume plaintiffs' seniority rights from IBC. If the latter finding is accepted, the reasoning goes, then the Union's only duty under the collective-bargaining agreement was to arbitrate the seniority issue, and the Union discharged this duty. Therefore there could be no violation of the fair-representation duty.

We disagree with this conclusion. All of the evidence at trial indicated that the Union knew that the purchase agreement existed, but did not know its terms, especially that it contained language of assumption. Thus the language of the purchase agreement played no role in the Union's decision not to negotiate; at most that language was a fortuitous circumstance that relates to what would have happened had it negotiated, not to what actually did occur. There is evidence that supports the inferences that the Local refused to act to protect plaintiffs from a known risk to their seniority and deceived them in the process. This establishes a violation of the fair-representation duty.

The District Court also reasoned that the Union had no reason to know that plaintiffs' seniority was in jeopardy until the lay-offs began in the first week of March 1983, so it had no duty to negotiate before then. But if Lessmann's testimony is accepted, and in this context it must be, then it appears that the Union knew within one or two days of the purchase that Metz would treat plaintiffs as

new hires. At that point, it could not refuse to represent plaintiffs' interests.

Finally, the District Court ruled that any negotiated solution would have to have been submitted to a ratification vote by the affected employees, and, since the Nicholas Street employees greatly outnumbered the Leavenworth workers (78 full-time and 33 part-time to 41 full-time and 21 part-time, District Court Ex. 3, at 2), any solution treating the Leavenworth group more favorably than the other employees would have been defeated. Thus negotiation would have been futile, and the Union should not be held liable for failing to undertake a futile effort. We note first that this argument goes to the issue of the proper remedy, not to whether the Union acted in bad faith in failing to negotiate. And second, assuming that only the Leavenworth and Nicholas Street employees would have voted (we cannot determine from the record who would have had the right to vote,[1] and the parties before us dis-

---

1. There are different statements in the record. Clausen testified that every Union member in Omaha (a group that included more than just the Metz and former IBC workers) had the right to vote on whether to ratify the general collective-bargaining contract initially. Tr. 1:134. Harry Smith, the Local's attorney, testified that only the Leavenworth and Nicholas Street members would have voted on a negotiated solution to Metz's consolidation of operations at the Leavenworth plant, *id.* at 166. The jury was not obliged to believe either of these witnesses. The District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that would have been feasible, and this will help the Court determine what would have occurred but for the Union's failure to negotiate. Plaintiff's will bear the burden of proof, and if the evidence is simply too sketchy or uncertain to justify anything more than speculation, their remedy would be merely a declaratory judgment and perhaps nominal damages.

agree on the issue), it simply does not appear that *any* proposed solution would have favored one or the other group exclusively. Indeed, the most probable compromise, dove-tailing the two groups, would have benefitted the seventy or eighty most senior employees in the two groups, and these would have been a majority of the voters.

In support of the judgment n.o.v., defendants argue that the Union would have breached its duty of fair representation to the Nicholas Street employees if it had negotiated to protect plaintiffs' antagonistic interests. But this overlooks the good-faith element of the duty. There is evidence to support a finding that the Union was dishonest in its representation of plaintiffs. If, however, the Union had in good faith discharged its duty to plaintiffs by negotiating with Metz, it does not follow that it would have represented the Nicholas employees in bad faith. A Union can represent conflicting interests, without fear of violating the fair-representation duty, so long as it does so in good faith. See, *e.g., Ryan v. New York Newspaper Printing Pressmen's Union No. 2,* 590 F.2d 451 (2d Cir.1979).

Defendants also argue that the evidence was uncontroverted that, had the Union negotiated the seniority issue with Metz before the lay-offs, Metz would have refused to make any concessions and would have laid off the plaintiffs anyway. This, again, is an argument about the appropriate relief, not whether the Union violated its duty. That negotiation would have been futile does not negate the Union's liability for bad-faith failure to negotiate; at most it demonstrates that plaintiffs did not suffer any ascertainable harm as a result of the breach of duty. Whether this is so must be determined at the remedies trial on remand.

B.

The jury also found that the Union violated its fair-representation duty in the way it handled the arbitration. The evidence on this issue, again construed most favorably for plaintiffs, was that Metz mailed lay-off notices to some of plaintiffs about March 1, 1983, and to the others about a week later. A grievance was filed on about March 4. On March 12, 1983, the Union held a meeting of the general membership of all of its Omaha bargaining units, at which it announced that it would arbitrate the seniority dispute caused by the layoffs, but would remain neutral as between the competing groups. Each group was asked to appoint two representatives to appear at the arbitration.

Plaintiff James Walker testified that he had the following exchange with the Local's president during the March 12 meeting:

> Q. What did you ask and who were you asking?
>
> A. Mr. Clausen.
>
> Q. What did you ask?
>
> A. I [asked] him would he have the purchase agreement at our Arbitration Hearing.
>
> Q. Did he respond?
>
> A. Yes. He said he would have it there.

Tr. I:185.

Walker and another plaintiff, William Marsh, were chosen to represent the former IBC employees at the arbitration. On March 19, 1983, they met with several Union representatives, including Harry Smith, the Local's attorney, and Clausen in Sioux City, Iowa, to discuss the arbi-

tration. The representatives of the Nicholas Street employees met with those officials later that day. The Union advised each group that it could retain independent counsel for the arbitration, and that any member of either group who wanted to testify at the arbitration could do so. At this meeting, no one asked the Union officials whether the purchase agreement would be introduced at the arbitration; Walker testified at trial that he "left that up to the —to the Union man." Tr. I:194.

Smith, the Local's attorney, handled the arbitration. He never asked for or looked at a copy of the purchase agreement before the arbitration. Instead, he telephoned Lessmann after the grievance was filed and, while they discussed the arbitration procedure, Lessmann told him that the transaction was merely a sale of assets, which did not obligate Metz to honor plaintiffs' seniority. Smith accepted Lessmann's description of the contract, and he made no further effort to investigate its terms. He was, however, present at the March 12 meeting when Clausen told Walker that the agreement would be introduced, or at any rate be available, at the arbitration.

At the arbitration, Smith called several employees from each of the competing groups to testify. Aside from these employees, the only other witness at the arbitration was Lessmann, who was called by Smith to testify about the terms of the purchase agreement. Lessmann told the arbitrator that the contract provided for a sale of assets from IBC to Metz, and, while Metz had agreed to maintain certain benefits—other than seniority—that the employees had obtained from IBC, he testified that the contract did not require Metz to assume their seniority. Metz's past

practice had been to treat "acquired" employees just as it treated the former IBC workers, as new hires, and Metz had no intention of changing that practice with the IBC transaction.

The purchase agreement itself was not given to the arbitrator, and there was no suggestion at that hearing that the language of the contract deviated in any way from Lessmann's description, much less that it contained language, in Sections 3.1(c) and 3.2(b), to the effect that Metz agreed to assume IBC's collective-bargaining agreement with plaintiffs *in toto*. The arbitrator's decision reflected this; among his findings of undisputed fact was:

> Third, there was no agreement between the two companies with respect to the status of the [IBC] employees upon the transfer of the assets of that Company to Metz.

P.Ex. 3, at 6.

In addition, Clausen testified at trial that his position from the time of the purchase was that Metz had assumed IBC's collective-bargaining agreement in full and was bound to honor plaintiffs' seniority. He testified that Smith must have known his stance, and he could not explain why Smith took a position contrary to his.[2] Clausen was present at the arbitration, but Smith did not call on him to testify.

On this record, we have no trouble concluding that the jury could have found a violation of the duty of fair repre-

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2. In a post-hearing brief, Smith did argue that Metz had assumed the IBC collective-bargaining agreement, but he did not supply a copy of, or quote from, the purchase agreement in support of this argument.

sentation. The jury could have inferred that Clausen lied when he told Walker that he would have the purchase agreement at the arbitration. The District Court acknowledged that this inference was possible, but ruled that a deception by Clausen could not establish a violation of the fair-representation duty because

> Mr. Walker and the other IBC employees knew the attorney [rather than Clausen] was handling the grievance hearing. Thus, even if the jury found that Mr. Clausen lied to Mr. Walker about the sales contract, that finding does not support the conclusion the Union's attorney treated the IBC employees and their claims dishonestly.

Thomas v. Bakery, Confectionery and Tobacco Workers Union Local # 433 No. CV 83-0-652 (D. Neb. Aug. 13, 1986), at 18-19. This analysis misconstrues the legal issue, which is whether the Union, not any one of its officers or agents, acted in complete good faith wth regard to plaintiffs' interests. Clausen acted on behalf of the Union, and if he deceived Walker about whether the sales contract would be placed before the arbitrator, that deception is attributable to the Local. And if the Local, through its president, deceived Walker about producing the sales contract at the arbitration, it violated its fair-representation duty regardless of whether the Local's attorney conducted the arbitration in good faith.

Other evidence also supports the jury finding on this issue. Smith, the Local's attorney, did not investigate the terms of the purchase agreement any further than discussing them briefly with Lessmann, who as Metz's general counsel was obviously interested in the outcome of the arbitration. Smith accepted Lessmann's account apparently

without question, and that description was the only evidence of the contract put before the arbitrator. Yet Smith knew that the words of the contract would be material to the dispute if they provided for assumption of plaintiffs' seniority, Tr. I:153-54, and, according to Clausen, Smith must have known the position Clausen took as president of the Local—that Metz had assumed the IBC collective-bargaining agreement *in toto*. In addition, Smith was present at the March 12 meeting when Clausen told Walker that the purchase agreement would be at the arbitration.

This evidence was sufficient for the jury to find at least that Smith was perfunctory in his representation of plaintiffs' interests. The District Court apparently thought so too, but it felt constrained to follow one of our decisions, *Smegal v. Gateway Foods of Minneapolis, Inc.*, 763 F.2d 354 (8th Cir.1985), *after remand*, 819 F.2d 191 (8th Cir.1987), which, in its view, required entry of judgment n.o.v. *Smegal* involved a complex series of transactions, including a partial sale of assets, from plaintiffs' former employer to their new employer. One of the agreements provided that the entire transaction was conditioned on the new employer's reaching a satisfactory labor agreement with the union within a short time. The union was unaware of the condition, and negotiated an agreement within the allotted time. Later, after the plaintiff union members discovered the condition, they sued the union on the theory that, had the union investigated the contracts and found the condition, it would have had much greater bargaining power and could have negotiated a labor agreement that would have been much more favorable to them. We held that the union's failure to review the language of the agreements was at most negligence, and thus insuffi-

cient to establish a violation of the duty of fair representation.

This case is distinguishable. In *Smegal* the union had no reason to think that the agreement contained terms favorable to the plaintiffs; nor was the situation one where the words of the contract between the two employers could have resolved the underlying labor issue: the contract provided only that the transaction was contingent on the purchaser's reaching a satisfactory labor agreement with the union within a certain time. Here, by contrast, the major issue at the arbitration was whether Metz had agreed to assume plaintiffs' seniority rights from IBC. This issue turned primarily on the terms of the contract between Metz and IBC. The Union did argue to the arbitrator that Metz expressly agreed to assume those rights, but the only evidence it produced to support this theory was Metz's interpretation of the agreement, and, of course, it was against Metz's interests to construe the contract to require assumption. Lessmann's testimony gave no indication to the arbitrator that the purchase agreement contained broad language of assumption that supported plaintiffs' theory. In addition, in light of Clausen's belief that Metz had assumed IBC's labor agreement and Walker's request that the Union produce the purchase contract at the arbitration, the Union should at least have requested a copy of it from Metz. The jury could reasonably have found that the Union's failure to make any attempt to obtain or introduce the purchase agreement at the arbitration reduced

its representation on the express-assumption theory to a mere formality, an empty gesture. This is the essence of perfunctory representation.[3]

III.

The District Court held that even if the Union violated the duty of fair representation, the evidence was insufficient to establish that the breach tainted the arbitration, so the arbitrator's decision would bind the parties in any event. See *Hines, supra,* 424 U.S. at 567-72, 96 S.Ct. at 1057-60. Even though the only evidence of the purchase agreement before the arbitrator was Lessmann's interpretation of it, the Court reasoned that this was sufficient to inform the arbitrator of the fact of the sale, which was the "essential" fact. Moreover, if the arbitrator thought that the contract terms themselves were essential, he could have requested a copy of the agreement: that he did not demon-

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3. Plaintiffs argue that since Smith is an attorney, the Union should be held to the standard of conduct of a reasonable attorney in its handling of the arbitration, and any breach of that standard establishes a violation of the duty of fair representation. We have rejected this argument before, see *Curtis v. United Transportation Union,* 700 F.2d 457, 459 (8th Cir. 1983), and we do so again here. A union representative need not be a lawyer and should not be held to a lawyer's standard of care.

Defendants argue, by contrast, that at worst Smith was guilty of mere negligence in not offering the purchase contract in evidence. That kind of default is not sufficiently grave to deserve condemnation as "perfunctory." See *Stevens v. Teamsters Local 600,* 794 F.2d 376 (8th Cir.1986). Even if this argument is correct, the jury verdict here must still be upheld, because Clausen's deception of Walker could have been found to amount to dishonesty, which constitutes a breach of the duty of fair representation, even if the Union's conduct was otherwise better than perfunctory.

strates that the terms were not essential. Since the arbitrator had all of the essential facts before him, the arbitral process was not tainted.

We disagree. The question for the arbitrator was whether Metz had broken the labor contract, and this turned in part on whether Metz had agreed to assume IBC's labor contract. The most important evidence on this issue was the language of Metz's promise to IBC, for the starting point in any interpretation of an agreement is the contract itself. In addition, we disagree that the fact of the sale was the "essential" fact; on this issue the essential fact was whether Metz promised to assume plaintiffs' seniority rights. And the fact that the arbitrator did not ask for a copy of the contract may indicate only that he had no reason to believe that the contract terms differed from Lessmann's description, not that he deemed the contract unessential.

The jury was within its rights in finding that the absence of the contract "seriously undermine[d] the integrity of the arbitral process." *Hines,* 424 U.S. at 567, 96 S.Ct. at 1058. The arbitrator had no knowledge of the contract's assumption clause, which was the strongest evidence in support of plaintiffs' legal theory. Without that evidence, plaintiffs' chances of proving express assumption were practically nil, especially in light of Lessmann's testimony. With that evidence, their chances would have been much greater. Thus the failure to present the contract to the arbitrator was a serious flaw in the procedure.

IV.

Metz and the Union argue that, if the judgment n.o.v. in their favor is not to be affirmed, they should at least

receive a new trial. The Union claims that the jury instruction on whether the violation of the fair-representation duty tainted the arbitration was erroneous in three respects: (1) it stated the wrong legal standard; (2) it did not adequately define the terms "tainted" and "seriously undermined"; and (3) it violated the policy of finality of arbitral decisions.

The instruction read in part:

> If you find that the plaintiffs have proven . . . that the Union breached its duty of fair representation . . ., then you must . . . determine whether the plaintiffs' interests were prejudiced by the breach. . . .
>
> In order to [prove] that the interests of the plaintiffs were prejudiced by the breach . . . plaintiffs must prove by a preponderance of the evidence that the conduct of the . . . Union tainted, that is seriously undermined, the integrity of the arbitration process.

Designated Record, at 91. This accurately stated the law, *Hienes,* 424 U.S. at 567, 96 S.Ct. at 1058, and we find no error in it. The meaning of the words "tainted" and "seriously undermined" is not beyond the ken of a reasonable juror, so no definition was necessary. And the policy of finality of arbitration decisions was considered and accommodated by the Supreme Court in fashioning this standard. See *id.* at 567-72, 96 S.Ct. at 1057-60.

Metz argues that the Court erred in submitting to the jury the question whether the purchase agreement bound Metz to assume IBC's labor obligations. We disagree. While construction of an unambiguous contract is a matter of law for the court, if the language is ambiguous its meaning becomes a question of fact for the jury. Here, in light

of Metz' evidence of its intent and past practice, the assumption language in sections 1.1(c), 3.1(c), and 3.2(b) was sufficiently ambiguous to present a jury question. Metz also argues that there is no evidence to support the jury's finding that it expressly or impliedly assumed the seniority provisions of IBC's labor contract, but we find the language of the purchase agreement itself sufficient to support that finding.

V.

We reverse the judgment n.o.v. and affirm the denial of a new trial. We remand this cause for reinstatement of the jury's verdict and for determination of relief.

It is so ordered.

HENLEY, Senior Circuit Judge, concurring and dissenting.

Even though the evidence in question is less substantial than one might desire it to be, I can agree with the majority that the jury could have inferred that Clausen knew plaintiffs' jobs were at risk, refused to negotiate, and then lied about plaintiffs' precarious situation. I could further agree that the Union had a duty to negotiate and breached it. Even so I would affirm judgment n.o.v. on this aspect of the case because on the record it is clear that there is no causal relationship between failure of the Union to negotiate and any injury to plaintiffs. As the district court found:

> The evidence is uncontradicted that the Union must obtain majority approval by its membership of any negotiated contract provision. Similarly, the evidence is uncontradicted that the IBC employees be-

> came Metz employees on February 19, 1983. Further, as stated earlier, the IBC employees and the Metz workers possessed antagonistic interests. And, finally, the evidence stands undisputed that the Metz group outnumbered the IBC unit by almost two to one. Thus, the evidence supports only the conclusion that if the Union had negotiated with Metz and obtained full recognition of IBC seniority for all the IBC employees (endtailing the Metz workers) or for some of them (dovetailing with the Metz workers), the tentative proposal could not have been approved unless the members of the majority Metz group voted against their own economic interests. Accordingly, the jury's verdict cannot stand since it necessarily rests on the irrational inference from the evidence that the majority group would have voted against its own interest. Further, insofar as the Union had a right to reasonably believe that seniority negotiations would be futile or would not result in an agreement favorable to the IBC workers, the evidence cannot support a finding that the Union acted arbitrarily or dishonestly in failing to negotiate with Metz.

This reasoning is most persuasive and I find unacceptable the speculation of the majority that a possible compromise of dovetailing is sufficient to support a finding of liability. *Barrett v. Thorofare Markets, Inc.*, 452 F.Supp. 880, 883-84 (W.D.Penn.1978) (plaintiffs could not prove how local would have voted on pension agreement), cited with approval in *Anderson v. United Paperworkers International Union*, 641 F.2d 574, 580 81 (8th Cir.1981). If there is no showing of probable injury, failure to negotiate should not call for reversal and remand for determination of a remedy.

With respect to the Union's failure to introduce into evidence before the arbitrator the Metz-IBC sales agree-

ment, I find at most negligence for which no liability attaches.

In the first place, it is somewhat anomalous to suggest that the Union had a duty to negotiate to protect the IBC employees' seniority rights, but even though they did not do so, those employees' rights were protected by the contract nonetheless. If the contract so clearly gave that protection, what purpose would negotiations have served? A second, but related, problem with the jury's verdict is that the contract is simply too vague on the subject of the IBC employees' rights upon transfer to Metz to assume, as the court appears to do, that contract introduction would have made any difference at the arbitration. While the agreement provides in two separate provisions that Metz was (1) to assume the IBC collective bargaining agreement, and (2) to enter into a novation with the IBC employees respecting that agreement, it nowhere provides that the IBC employees would be dovetailed with the Metz employees or that they would not be endtailed. Both groups were covered by an industry-wide agreement, which did not provide for either dovetailing or endtailing. The agreement as it applies to Metz and its original employees did not provide for dovetailing should Metz acquire a new company, and Metz could not have added a term to that agreement without the Union's participation simply by entering into a sales contract with IBC. *See, e.g., NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962) (employer who changed wage and benefit provisions without consulting union violated duty to bargain collectively under the NLRA). The arbitrator correctly applied the rule that seniority rights can "exist only by virtue of and to the extent provided by a bargaining agreement." Arbitrator's Decision and Award at 6

(citing *Local 1251, UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir.1968) (en banc)). Thus, with respect to seniority undoubtedly the sales agreement conferred no greater rights than the bargaining agreements, and the arbitrator ruled that those agreements did not dispose of the issue.

Consequently, although we as well as a jury might consider the Union's actions with regard to the arbitration distasteful, the plaintiffs simply have not shown that the Union's conduct in fact was a cause of any injury to them, and thus there can be no liability. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568, 96 S.Ct. 1048, 1058, 47 L.Ed.2d 231 (1976) (focus is on "whether there is a substantial reason to believe that a union breach of duty contributed to the erroneous outcome"); *Humphrey v. Moore*, 375 U.S. 335, 351, 84 S.Ct. 363, 372, 11 L.Ed.2d 370 (1964) (agreeing with trial court it was "idle speculation" for employees to assume result of hearing "would have been different had the matter been differently presented" by the union); *Anderson*, 641 F.2d at 580-81, 580 n. 8, and cases there cited.

While I agree with the court that we should affirm the denial of a new trial, largely upon the findings and reasoning of the district court, I would affirm the judgment n.o.v. as well. *See* 8th Cir. R. 14.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS JR. et al.,	)	CV 83-0-652
Plaintiffs,	)	
vs.	)	ORDER
BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #442, et al.,	)	(Filed August 13, 1986)
Defendants.	)	

This matter is before the Court upon the Court's reconsideration of the motion (filing 50) of the defendant Metz Baking Co. for judgment notwithstanding the verdict, or in the alternative for a new trial, and the motion (filing 52) of the defendant Union for judgment notwithstanding the verdict, or in the alternative for a new trial. The Court, after a review of the briefs and the evidence in conjunction with the applicable law, finds that the motions for judgment notwithstanding the verdict should be granted and that the motions for new trial should be denied.

BACKGROUND

In this civil action, the plaintiffs, former employees of Interstate Brands Corporation and employees of defendant, Metz Baking Company filed suit against two defendants, the Bakery, Confectionery and Tobacco Workers Union Local No. 433 and the Metz Baking Company.

The defendant Metz Baking Company, with its principal place of business in Sioux City, Iowa, operated a bakery

facility in Omaha, Nebraska, at 4383 Nicholas Street in 1983. Interstate Brands Corporation, at that time, also operated a bakery facility in Omaha, Nebraska, between 24th and 25th on Leavenworth Street in Omaha. In January, 1983, representatives of both companies agreed upon the sale of Interstate Brands Omaha bakery facility to Metz. The sale was closed on February 19, 1983, and Metz took possession of the plant, equipment and routes of Interstate Brands on February 21, 1983. Metz operated the Leavenworth Street bakery facilities without change until March 2, 1983. At that time, Metz consolidated all production at the Leavenworth Street plant and transferred the employees from the Nicholas Street plant to Leavenworth Street. This resulted in the lay-off of a substantial number of Interstate employees who had previously worked at the Leavenworth Street plant. Metz treated the former Interstate Brands' employees as new hires and placed (end-tailed) them at the bottom of the seniority list which served as the basis for the lay-offs.

The defendant Union, Local No. 433, represented the employees at both facilities. The collective bargaining agreements for both bargaining units were identical.

A grievance was filed by the Union for the employees on the Interstate Brands' seniority list which alleged that the seniority provisions of the contract were unfairly and improperly implemented by the defendant Metz. The matter proceeded to arbitration before Mr. James A. Doyle on April 26, 1983. The Union took a neutral position. Employees on the seniority list of Metz and the seniority list of Interstate Brands, together with representatives of Metz, appeared and testified. The arbitrator denied the

grievance which denial had the effect of upholding the action of Metz in laying off plaintiffs.

The defendant Local Union claims that it took a neutral position at the arbitration hearing because it represented both groups of employees. The defendant Local Union further claims that it represented both groups of employees in a fair and honest manner and fulfilled its duty to fairly represent all parties to the arbitration proceeding, including the plaintiffs.

The defendant Metz alleges that oral testimony by the witnesses at the arbitration hearing accurately informed the arbitrator of the contents of the sales contract between Interstate Brands Corporation and Metz Baking Company and that the decision of the arbitrator was fair, reasonable and proper under the circumstances.

DISCUSSION

The case was bifurcated for purposes of trial. The issue of liability was tried before a jury. The defendants moved for a directed verdict. The Court allowed the case to go to the jury with the admonition that even if a Court determines that a motion for directed verdict should be granted, it is considered better practice for a Court to send the case to the jury without directing a verdict and to then pass on the sufficiency of the evidence under a post-verdict motion. C. Wright and A. Miller, *Federal Practice and Procedure* § 2533 (1971); *Tackett v. Kidder*, 616 F.2d 1050, 1052-53 (8th Cir. 1980). The jury returned a special verdict finding in favor of the plaintiffs and against the defendants. (Filing 49—Attached as Appendix A). Since this case was bifurcated for trial, the Court finds it is appropriate to rule on the motion for judgment notwithstanding

the verdict at this time rather than proceeding with a lengthy and costly trial of the damages issues.

"The standard for granting judgment notwithstanding the verdict is the same as for a directed verdict." *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1235 (8th Cir. 1980), *citing Schneider v. Chrysler Motors Corp.*, 401 F.2d 549, 554 (8th Cir. 1968). As the Eighth Circuit stated in *Lord v. Wilkerson*, 542 F.2d 1034, 1035 (8th Cir. 1976):

> A motion for a directed verdict should be granted "only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Barclay v. Burlington Northern, Inc.*, 536 F.2d 263, 267 (8th Cir. 1976); *Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Co.*, 523 F.2d 833, 836 (8th Cir. 1975). As this Court has noted,
>
> > [A] motion for a directed verdict is properly denied where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions. * * * In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. (Citations omitted.)
> >
> > *Vickers v. Gifford-Hill & Co.*, 534 F.2d 1311, 1315 (8th Cir. 1976), *quoting Giordano v. Lee*, 434 F.2d 1227, 1231 (8th Cir. 1970), *cert. denied*, 403 U.S. 931 (1971).
>
> *See also Voegeli v. Lewis*, 568 F.2d 89, 92 (8th Cir. 1977); *Banks v. Koehring Co.*, 538 F.2d 176, 178 (8th Cir. 1976); *Griggs v. Firestone Tire and Rubber Co.*, 513 F.2d 851, 857 (8th Cir.), *cert denied*, 423 U.S. 865 (1975).

Lord v. Wilkerson, 542 F.2d at 1035. Therefore, the Court must view the evidence and legitimate inferences from the

evidence in the light most favorable to the nonmoving party. However, a mere "scintilla" of evidence cannot support a verdict. *Tackett v. Kidder,* 616 F.2d 1050, 1052-53 (8th Cir. 1980).

The jury found that the union breached its duty of fair representation to the plaintiffs by (a) failing to negotiate with defendant Metz in regard to job seniority upon Metz' purchase of IBC's Omaha facility and by (b) the manner in which the Union handled and processed the grievance and arbitration proceeding.

After a careful review of the evidence, the Court concludes that the jury verdict must be set aside and judgment should be entered for the defendants.

In this case, the arbitrator's decision in favor of Metz Baking cannot be reviewed unless the Union was found to have breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 567-69 (1976); *Dogherra v. Safeway Stores, Inc.,* 679 F.2d 1293 (9th Cir.), *cert. denied,* 459 U.S. 990 (1982); *see also Abernathy v. U.S. Postal Service,* 740 F.2d 6112 (8th Cir. 1984). Thus, Metz' alleged liability for breach of contract does not become an issue unless it is determined that the Union breached its duty of fair representation.

The duty of fair representation imposes upon the Union, as exclusive bargaining agent in the negotiation and administration of the collective bargaining contract, a responsibility and duty fairly to represent, as individuals as well as collectively, the employees within the bargaining unit. *Smith,* 619 F.2d at 1235, *citing Humphrey v. Moore.* 375 U.S. 335, 342 (1964).

The Eighth Circuit has described in detail the scope of the duty of fair representation:

> While the scope of the duty of fair representation has never been precisely defined, it "is a legal term of art, incapable of precise definition," and calls for an ad hoc review of each factual situation, *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* UAW, 469 F.2d 181, 182 (4th Cir. 1972), its evolution through the fires of court decisions leaves no doubt about its purpose. *St. Clair v. Local Union No. 515 of the International Brotherhood of Teamsters,* 422 F.2d 128, 130 (6th Cir. 1969). In particular, "the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes,* 386 U.S. at 182.
>
> In order to meet its purpose, the scope of the duty of fair representation is in some ways very broad. The responsibility fairly to represent employees is equal in scope to the union's broad authority in the negotiation and administration of the collective bargaining agreement. *Humphrey v. Moore,* 375 U.S. 335, 342 (1964). Thus the duty attaches to all stages of the negotiation and administration process and is owed to all employees within the unit represented. However, because of the need to balance the individual interests of employees with their collective interests, the duty of fair representation must not be construed to subvert the basic purposes of organized labor by inhibiting union representation of collective interests. The Supreme Court has stated that in the negotiation process, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman,* 345 U.S. at 338. The standard by which to measure union conduct was further defined in *Vaca v. Sipes,* 386 U.S. 171 (1967). In

the administration of the collective bargaining agreement, the union has "a statutory obligation to serve the interests of all members [of a designated unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177. *See also King v. Space Carriers, Inc.*, 608 F.2d 283, 286-287 (8th Cir. 1979).

The Fourth Circuit Court of Appeals clearly articulated the import of *Vaca* in *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* UAW, 469 F.2d 181, 193 (4th Cir. 1972):

> A union must conform its behavior to each of these three separate standards. First, it must treat fractions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.
>
> * * * * * * * * *
>
> * * * Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.

Smith, 619 F.2d at 1236-37.

First, with regard to the jury's finding that the Union breached its duty of fair representation by failing to negotiate with Metz in regard to job seniority upon Metz' purchase of IBC's Omaha facility, the jury found that Metz both expressly and impliedly assumed IBC's collective bargaining agreement with the Union. If, indeed, the con-

tract was assumed, then the Union had the duty to utilize the contractual grievance procedure to protect the IBC's contractual rights, which duty it fulfilled. Arbitration was necessary to determine the proper interpretation of the seniority provisions since the contract was silent on the subject of assembling one work force from two bargaining units.

In any event, even if this Court were to determine that the Union had a duty to negotiate under these circumstances there was insufficient evidence from which a jury could reasonably infer that the Union breached its duty. All the evidence leads to the conclusion that the Union had no reason to believe that it needed to negotiate with Metz about seniority until Metz began laying off workers. Also, neither agreement provided for renegotiation. Thus, the Union had no reason to believe that it could force Metz to renegotiate seniority provisions or that it could successfully renegotiate a more favorable situation for plaintiffs. Even so, in negotiating or renegotiating a collective bargaining agreement, "the sole inquiry is whether under all the circumstances the Union has considered the interests of *all* of its members." *Smith v. Joseph E. Seagram & Sons*, 634 F. Supp. 44, 47 (W.D. Ky. 1985). In this case, the jury could not properly find that the Union breached a duty to negotiate with Metz to obtain more favorable treatment for plaintiffs over Metz' workers. The Union was obligated to fairly consider the interests of original Metz' workers as well. Therefore, there was no causal connection between a failure to negotiate, if such a duty existed, and any harm that came to the plaintiffs.

The evidence was undisputed that Metz was operating, in tandem, the Leavenworth Street and Nicholas Street plants between February 19, and March 2, 1983. Marlin Lessman, employed by Metz as Vice-President, Secretary and General Counsel, testified that Metz recognized the seniority of the IBC workers during the time the plants were run in tandem. The IBC employees saw no changes at work except the company's name on their paychecks. There is simply no evidence from which the jury could reasonably infer that the Union acted arbitrarily since the Union was reasonable in believing that no IBC seniority problem existed until March 1, 1983, when Metz sent out layoff notices. And, at that time, the Union began processing a grievance for the IBC employees. The Union did not stand obligated to investigate the company's position at an earlier time, since the company was operating the two plants as separate operations. *Smegal v. Gateway Foods*, 763 F.2d 354 (8th Cir. 1985).

There was a conflict in testimony between Marlin Lessman and Bernard Clausen, the Baker's Union President. Mr. Lessman testified he told Mr. Clausen that Metz intended to treat the IBC workers as new hires. Clausen denies that Lessman told him that. One witness, James Walker, testified that Mr. Clausen told one IBC employee, after the purchase of the plant, that his job was secure—"not to worry." The witness could not pinpoint when Clausen made the statement to him. He did place the statement at a time after Metz purchased the plant, but before the layoff notices. Assuming that the jury (a) believed Walker's testimony (b) considered Clausen's actions dishonest and (c) that such actions deterred the IBC

workers from requesting that the Union bargain with Metz, the evidence still does not support the jury's verdict.

The evidence is uncontradicted that the Union must obtain majority approval by its membership of any negotiated contract provision. Similarly, the evidence is uncontradicted that the IBC employees became Metz employees on February 19, 1983. Further, as stated earlier, the IBC employees and the Metz workers possessed antagonistic interests. And, finally, the evidence stands undisputed that the Metz group outnumbered the IBC unit by almost two to one. Thus, the evidence supports only the conclusion that if the Union had negotiated with Metz and obtained full recognition of IBC seniority for all the IBC employees (endtailing the Metz workers) or for some of them (dovetailing with the Metz workers), the tentative proposal could not have been approved unless the members of the majority Metz group voted against their own economic interests. Accordingly, the jury's verdict cannot stand since it necessarily rests on the irrational inference from the evidence that the majority group would have voted against its own interest. Further, insofar as the Union had a right to reasonably believe that seniority negotiations would be futile or would not result in an agreement favorable to the IBC workers, the evidence cannot support a finding that the Union acted arbitrarily or dishonestly in failing to negotiate with Metz.

The evidence was insufficient for a jury to reasonably find that negotiations between Metz and the Union would have affected the layoffs. The only testimony on point indicated that Metz intended to keep its own employees on the job when it transferred the Nicholas Street operation

to the Leavenworth Street facility. The evidence was undisputed that Metz, in fact, endtailed the IBC employees covered by the collective bargaining contracts with the Operating Engineers Union and the Teamsters Union. No testimony contradicts Mr. Lessmann's statement that Metz felt that nothing in its sales contract with IBC prevented it from endtailing the IBC employees. Also, as stated earlier, the evidence does not support a conclusion that the Union membership would have approved a negotiated settlement to dovetail. Accordingly, Metz had no reason or inclination to agree to handle the layoffs in any other way.

The jury also found that the Union breached its duty of fair representation toward the IBC employees in the manner it handled the arbitration proceedings and because it did not present a copy of the sales contract between Metz and IBC to the Arbitrator. The Court finds that neither of these actions by the Union amounted to a breach of the Union's duty of fair representation, as a matter of law.

Resolving all conflicts in the evidence in favor of the plaintiffs and accepting their testimony in full, the evidence shows that the Union initiated a grievance on behalf of the IBC employees as soon as Metz issued layoff notices to the IBC employees. The IBC employees found the wording of the grievance satisfactory. The Union filed the grievance and requested arbitration of the grievance upon receiving the signed grievance from the IBC employees. The Union turned over the handling of the grievance to its attorney. The union informed both groups it intended to take a neutral position in the arbitration. The Union allowed the IBC group and the Metz group to se-

lect their own representatives to participate in the arbitration.

The Union arranged for and attended meetings between the representatives of the two groups with the Union's attorney in Sioux City, Iowa. The meeting with the IBC employees lasted about ten minutes. The meeting for the Metz workers lasted about one-half hour. At the meetings with both groups, the employees discussed the reasons why they felt they should keep their jobs.

At the meeting with the Union attorney, one IBC employee (Walker) asked Clausen about the IBC-Metz sales agreement. Clausen told him it would be at the arbitration hearing. The IBC employees did not discuss Metz' assumption of the IBC collective bargaining agreement or the unilateral change of their seniority date by Metz. The Union attorney advised the IBC employees they could hire other counsel for the arbitration, but did not tell them (Marsh) that they had to pay for such attorney. The Union attorney told them he believed the "successor" clause in the collective bargaining agreement would be "kicked out" by the court.

At the arbitration, the Union attorney met briefly before the hearing started with the witnesses for both groups. At no time during the hearing did the Union attorney restrict what any witness from either group said. None of the IBC witnesses testified at the arbitration hearing regarding the absence of or the need for production of the sales agreement at the hearing. The Union allowed anyone from either group (who wished to do so) to testify.

The evidence shows that the Union treated both the IBC employees and the Metz employees fairly and with substantial equality. The evidence cannot support a finding that the Union breached its duty of fair representation toward the IBC employees, unless the Union arbitrarily or dishonestly ignored the claimed signifance of the written sales contract in advocating the interests of the IBC group at the arbitration proceedings. *Crusco v. Fisher & Bro. Inc.*, 458 F. Supp. 413, (S.D.N.Y. 1978).

If the Union improperly ignored the claimed significance of the written sales contract, the jury might have concluded that the Union attorney's abbreviated meeting with the IBC employees and his failure to discuss certain issues with them rendered the Union's position less than neutral and rendered the Union's failure to submit a copy of the sales contract a breach of the Union's duty of fair representation.

With regard to the sales contract between Metz and IBC, sufficient evidence existed for the jury to find that the Union's attorney discussed the nature of the contract only briefly with Lessmann prior to the arbitration. The evidence further supports the conclusion that the Union viewed the specific terms of the sales contract as "immaterial" to the arbitration hearing. The evidence further justifies a finding that the Union attorney relied upon Lessmann's representations both before and at the arbitration hearing concerning Metz' obligations under the sales contract. Nonetheless, that evidence, does not support a finding that the Union breached its duty of fair representation toward the IBC employees.

In a recent decision, the Eighth Circuit Court of Appeals confronted an identical set of facts in which a union allegedly improperly failed to investigate and examine a purchase contract between two companies. The Court found:

> We think this case requires analysis at two stages. The first is approximately July 6, 1981, when the operations were transferred. Up to then the Union had accepted the employers' representation that subcontracting was involved. It had not attempted to examine the contracts between National and Gateway. It was not aware of the leverage it could exert by refusing to make a 'satisfactory' agreement with Gateway. Although it had negotiated certain favorable terms for former National employees when hired by Gateway, the Union had pretty clearly worn its Gateway hat while negotiating. It refused to permit National employees to participate in the bargaining process. This was all consistent with acceptance of the subcontracting theory.
>
> * * *
>
> The first stage was carefully considered by the district court, and we agree with the conclusion reached. The proof as of that stage shows failure to investigate the transaction and failure to perceive a legal theory. 'Mere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty of fair representation.' *N.L.R.B. v. Am. Postal Wkrs. Union, Etc.*, 618 F.2d 1249, 1255, (8th Cir. 1980). If there were no second stage, summary judgment for defendants would have been appropriate.

Smegal v. Gateway Foods, 763 F.2d 354, 359 (8th Cir. 1985).

In *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), the Court, at length, defines arbitrary Union conduct and its basis in sound policy. The Court states:

We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance. To the contrary, we have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances. *See, e.g., Castelli,* 752 F.2d at 1482; *Dutrisac,* 749 F.2d at 1273; *Singer v. Flying Tiger Line, Inc.,* 652 F.2d at 1355; *Ness v. Safeway Stores, Inc.,* 598 F.2d 558, 560, (9th Cir. 1979); *see also, Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 571, (1976). We have said that a union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the grievance at an arbitration hearing. *See, Dutrisac,* 749 F.2d at 1273. In short, we do not attempt to second-guess a union's judgment when a good faith, non-discriminatory judgment has in fact been made. It is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued. We reaffirm that principle here.

Sound policy reasons militate against imposing liability on unions for errors of judgment made while representing their members in the collective bargaining process. In *Dutrisac,* we recognized that holding unions liable for such errors would serve ultimately to "defeat the employees' collective bargaining interest in having a strong and effective union." 749 F.2d at 1273. If unions were subject to liability for "judgment calls", it would necessarily undermine their discretion to act on behalf of their members and ultimately weaken their effectiveness. In the long run, the cost of recognizing such liability would be borne not by the unions but by their memberships. Not only would the direct costs of adverse judgments be passed on to the members in the form of increased dues, but, more importantly, unions would become increasingly reluctant to provide guidance to their members in

> collective bargaining disputes. Such a result would be inconsistent with our oftrepeated commitment to construe narrowly the scope of the duty of fair representation in order to preserve the unions' discretion to decide how best to balance the collective and individual interests that they represent.
>
> Freeing a union from liability for ordinary acts of negligence in the performance of its representational responsibilities requiring judgment on its part, reflects a balance of the union's organizational interest against the individual interests of its members. Our cases, and those of the Supreme Court, tip the balance in favor of the union, and accept the consequence of uncompensated loss sustained by an individual union member. Whether liability for a loss occasioned by ordinary negligence of the union might be spread more equitably among the membership as a whole, rather than be borne by the individual member who is harmed, is no longer an open question.

Peterson, 771 F.2d at 1254-55.

Even if the jury found that the Union's attorney inadequately investigated Metz' obligations under the sales contract with IBC, that lack of investigation can not be said to comprise a breach of the Union's duty of fair representation toward the IBC employees. *Hellums v. Quaker Oats Co.*, 760 F.2d 202 (8th Cir. 1985) ("We do not take issue with the finding of the District Court that Local 125 was negligent in its investigation. Mere negligence, however, does not rise to the level of a breach of the duty of fair representation." *Id.* at 206.)

Similarly, even if the jury found the Union attorney's view of the significance of the written sales contract clear-

ly wrong[1] the Union urges that such a finding does not support the conclusion the Union breached its duty of fair representation toward the IBC employees. Mere failure to perceive a legal theory does not comprise a breach of the Union's duty of fair representation. *Smegal v. Gateway Foods,* 763 F.2d 354, 359 (8th Cir. 1985); *Sanders v. Youthcraft Coats & Suits, Inc.,* 700 F.2d 1226 (8th Cir. 1983). Further, even if the jury found that the Union's attorney improperly relied upon Mr. Lessmann's testimony at the arbitration hearing because Lessmann inaccurately testified regarding Metz' obligations under the sales contract, that finding does not support the conclusion the Union violated its duty of fair representation toward the IBC employees. At most, the Union's actions comprised poor judgment. Such actions do not support the jury's verdict. *Taylor v. Belger Cartage Service,* 762 F.2d 665 (8th Cir. 1985).

In sum, then, the evidence before the jury, at most, showed that the Union acted negligently in regard to its handling of the written sales contract between Metz and IBC. Such a showing does not support the jury's finding that the Union committed a breach of its duty of fair representation toward the IBC employees on the basis of arbitrary or perfunctory conduct.

One IBC employee, Mr. Walker, testified that he asked President Clausen about the sales contract and Mr. Clausen said the Union would have it at the arbitration hearing. From that testimony, the jury might have con-

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[1] The jury evidently made such a finding because it found Metz expressly assumed the IBC collective bargaining contract with the Union.

cluded the Union lied to the IBC employees and treated their claims dishonestly. However, even that evidence, does not support the jury's verdict in light of the totality of the evidence. The Union's attorney, not Mr. Clausen, was handling the arbitration hearing. Mr. Walker and the other IBC employees knew the attorney was handling the grievance hearing. Thus, even if the jury found that Mr. Clausen lied to Mr. Walker about the sales contract, that finding does not support the conclusion the Union's attorney treated the IBC employees and their claims dishonestly. Since it does not, no basis exists to find that the Union breached its duty of fair representation toward the IBC employees.

The Union's position finds additional support in the great weight of the other evidence. The Union's attorney did not know, personally, any of the IBC or Metz workers before he met with them in regard to the arbitration. No animus or other reason for him to treat the IBC employees dishonestly existed. Further, the evidence stands undisputed that the Union's attorney relied on Mr. Lessmann's statements about the contents of the sales contract because he trusted Lessmann, not because he wanted to deceive the IBC employees. So too, the evidence stands uncontroverted that the Union's attorney viewed the written sales agreement as immaterial to the arbitration hearing and as adequately presented in Mr. Lessmann's testimony at the hearing. Finally, all employees, who testified at trial and at the arbitration hearing, admitted that the Union's attorney in no way restricted their testimony. In sum, then, the great weight of evidence shows that the Union's agent, who handled the arbitration, in no way

dealt with the IBC employees dishonestly. And since the proof shows no deceit or dishonesty, the jury could not properly find that the Union breached its duty of fair representation. As stated earlier, the Union attorney's mere failure to assert a possible claim under the sales contract does not comprise a breach of duty. *Russom v. Sears, Roebuck & Co.*, 558 F.2d 439, 442 (8th Cir. 1977).

In summary, the jury's verdict in regard to the Union's breach of its duty toward the IBC employees cannot stand close scrutiny. The weight of the evidence shows that the Union treated both the IBC and the Metz groups fairly and without discrimination. At most, the Union exercised poor judgment in its handling of the sales contract issue. And, in no way did the Union's attorney deal with the IBC employees and their claim dishonestly. Thus, the jury cannot be allowed to "second-guess the arbitration strategy of the union attorney." *Johnson v. Jos. Schlitz Brewing Co.*, 581 F. Supp. 338, 344 (M.D.N.C. 1984). *See Liotta v. Nat'l Forge Co.*, 473 F. Supp. 1139, 1144 (W.D. Penn. 1979). As a result, the decision of the arbitrator must stand. The issue of Metz' alleged liability for breach of contract need not be reached.

In any event, even assuming the jury correctly found that the Union breached its duty of fair representation in its handling of the grievance at arbitration, the evidence does not support the conclusion the Union's actions tainted the arbitration award. In *Brown v. TWA*, 746 F.2d 1354 (8th Cir. 1984), the Court of Appeals indicated that tainting an arbitration award means denying the arbitrator *essential facts* upon which to make a ruling. Nothing in the evidence shows that Arbitrator Doyle did not have the essential facts of the case before him.

Arbitrator Doyle clearly knew of the sale. Further, the Arbitrator had Metz' interpretation of the sales contract. At most, the Arbitrator did not have the IBC employees' reading of the written sales agreement and their contentions as to its meaning.[2] In turn the jury had no basis to conclude that Arbitrator Doyle, as a result of the Union's actions or inactions, did not have all the facts necessary to make a valid decision. Indeed, if the Arbitrator felt that a copy of the written contract was necessary for his dispute determination, he possessed the right to ask for a copy of it. Therefore, the jury lacked an evidentiary basis to conclude that the Union's purported breach resulted in tainting the arbitration decision. Such a conclusion finds further support in the undisputed evidence that the collective bargaining agreement did not contain any language regarding how to merge the Metz and IBC seniority lists. And, the sales agreement, at most, obligated Metz to assume the IBC contract in full. Accordingly, nothing in the sales contract required Arbitrator Doyle to handle the merger issue differently. At most, the absent sales contract, even if Doyle agreed with the IBC employees, might have strengthened the IBC employees' case at arbitration. Anything beyond such a conclusion, lacks evidentiary support. And, that conclusion does not support the jury's verdict. *Hardee v. North*

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[2] In its brief to the Arbitrator, the Union did argue that Metz had assumed the IBC collective bargaining agreement. (Defendant's Ex. 108 at 5-6.) Further, the brief of the Union raised as an issue before the Arbitrator whether Metz had impliedly assumed IBC's contract by its conduct. (*Id.* 15 8.) Thus, the Union argues that the only matter not before the Arbitrator was the IBC employees' interpretation of the written sales contract.

Carolina Allstate Service, Inc., 537 F.2d 1255, 1257-58 (4th Cir. 1976).

Accordingly, the Court finds that the jury verdict must be set aside and that the defendants' motions for judgment notwithstanding the verdict should be sustained.

Accordingly,

IT IS ORDERED that the motion (filing 50) of defendant Metz Baking for judgment notwithstanding the verdict should be and hereby is granted. The alternative motion for new trial is denied.

IT IS FURTHER ORDERED that the motion (filing 52) of defendant Union for judgment notwithstanding the verdict should be and hereby is granted. The alternative motion for new trial is denied.

DATED this 13th day of August, 1986.

BY THE COURT:

/s/ C. Arlen Beam
C. ARLEN BEAM, CHIEF
JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX D

IN THE MATTER OF ARBITRATION BETWEEN	)	
Metz Baking Company and The Bakery, Confectionary and Tobacco Worker's Union, Local No. 433	)	*Decision and Award*

The hearing in this matter was held on April 26, 1983 before James A. Doyle, Arbitrator, appointed by mutual agreement of the parties.

Appearances

For the Company

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Omaha, Nebraska 68114

For the Union

Harry H. Smith, Esquire
632-640 Badgerow Building
Sioux City, Iowa 51101

Statement of Facts

The facts in this case are not in dispute. The Metz Baking Company, with its principal place of business in Sioux City, Iowa, operates bakery facilities in Sioux City, Omaha, and other locations in Nebraska, South Dakota,

and Minnesota. The dispute in this proceeding involves its operations in Omaha, Nebraska. It's [sic] plant at 4383 Nicholas Street in Omaha produced and marketed under the "Old Home" label. Its principal competitors in the Omaha area were the Interstate Brands Corporation, whose plant was located on Leavenworth Street, where bakery products were produced and marketed under the "Butter Nut" label; and ITT - Continental Baking Company, whose products bear the "Wonder Bread" label.

These baking companies are parties to an industry wide bargaining agreement with the Baking, Confectionery and Tobacco Worker's Union, Local No. 433, which represents employees engaged in the preparation, production, shipping, wrapping and packing of bakery products, and truck loaders and miscellaneous helpers.

In February 1983 the Metz plant on Nicholas Street was operating on a two and one-half shift basis with 78 full-time employees and 33 part-time employees. At the same time the Interstate Brands Corporation, with its principal place of business in Kansas City, Missouri, had 41 full-time employees and 21 part-time employees engaged in the production of bread and buns on a one shift per day basis at its plant on Leavenworth Street in Omaha. The Company was operating the plant at a substantial loss, which warranted a conclusion that if not disposed of, closure of the plant was probable, if not inevitable.

Sometime in January 1983 representatives of Interstate sought and entered into negotiations with representatives of Metz for the sale of its Omaha plant to Metz. Agreement was reached under the terms of which Metz acquired Interstate's plant, equipment, and its routes, but

not its trucks. The sale was closed on February 19, and Metz took possession of the plant, equipment and routes on February 21. The Union, it appears, was informed that the acquisition was being discussed, and if successful the two plants would be operated in tandem temporarily, its objective being to retain as much of the Butter Nut business as possible. After about two weeks of such tandem operation Metz closed its Nicholas Street plant and consolidated operations and equipment in the Interstate facility on Leavenworth Street because of its size and more modern equipment. The Nicholas Street plant was utilized thereafter as a truck storage facility.

In the move to the Interstate plant the reorganization resulted in the layoff of more than 40 of the employees on the Interstate seniority list. Metz treated the former Interstate employees as new hires and placed them at the bottom of the seniority list. However, the Company recognized their benefit rights under the industry contract, namely their accrued vacation rights, health and accident insurance benefits and pension rights. This reorganization gave preference to Metz employees with respect to job bidding, promotion, demotions, layoffs and recall rights.

The evidence establishes that during the first week of February 1983, production of bread and buns at the Metz plant amounted to 453,409 pounds, compared to 276,559 pounds produced at the Interstate plant. Based on these figures the production by Metz amounted to 62 percent of the combined production of the two plants.

A grievance was filed by the employees on the Interstate seniority list in which they alleged that the seniority

provisions of the contract were unfairly and improperly implemented by Metz. Restoration to their jobs in accordance with their seniority and with back pay was requested.

The Company's position is that in treating the employees of Interstate as new hires it was following its past practice and that of the industry. It supported this by testimony of numerous acquisitions of bakery routes by Metz from 1967 through 1980 in all of which the employees on such routes were considered as new hires. It contends that as the surviving company, and the largest of the two, to integrate the seniority lists would discriminate against loyal Metz employees, and confer a windfall on Interstate employees who were facing the probable loss of their jobs because of the financial condition of their employer.

The Union in this case has taken a neutral position because it is the bargaining representative of bakery employees under the identical contract signed by Metz and Interstate. Employees on the seniority list of Metz appeared and testified in support of the Company's action in treating Interstate employees as new hires. They argued that as employees of the surviving and dominant company they were following the work, and the integration of the Interstate employees on a one-to-one basis would be discriminatory and confer a windfall on the employees of a plant in a failing condition.

The Interstate employees, on the other hand argue that Metz agreed to assume the Union contract, the business is being carried on in the former Interstate plant; and it would be grossly inequitable to ignore their seniority rights. They argue that a fairer solution would be the dovetailing of the two seniority lists. If dovetailing is not

recognized, the minimal remedy should be entitlement to severance pay.

Statement of the Issue

The issue in this proceeding may be defined as follows: Did the Metz Baking Company violate the seniority rights of employees of the Interstate Brands Corporation when it acquired the assets of that Company, consolidated operations, and treated such employees as new hires. If so, what is the appropriate remedy?

Discussion

Arbitrators have wrestled with the problem of merging seniority lists in a wide variety of factual situations. In an effort to achieve an equitable solution involving a valuable contractual benefit, certain criteria for achieving that result have evolved. They have been identified as follows: 1) the survivng group principle; 2) the length of service principle; 3) the follow the work principle; 4) the absolute rank principle; and 5) the ratio rank principle. *Kennedy, Merging Seniority Lists,* BNA, *Labor Arbitration and Industrial Change,* 1963. What criterion will be found appropriate to achieve an equitable result will depend upon the particular facts and circumstances involved.

In approaching the issue in this case the following undisputed facts should be kept in mind.

First, Metz and Interstate are parties to the same bargaining agreement with Local No. 433 covering the production employees. Plant wide seniority applies with respect to filling jobs, layoff, right to recall and other benefits. The contract does not contain any provisions defining the rights of employees if a plant is closed, or work is transferred from one plant or location to another, or what

recognition, if any, shall be accorded employees if the employer disposes of its assets, or acquires the assets of another company by purchase, merger, or consolidation.

Second, the transaction between Metz and Interstate was a sale of assets to Metz, properly defined as an acquisition and not a merger or consolidation of the parties in the legal sense. There was, however, an economic consolidation of production operations in the larger and better equipped plant acquired by Metz.

Third, there was no agreement between the two companies with respect to the status of the Interstate employees upon the transfer of the assets of that Company to Metz.

Fourth, it appears that while negotiations for the purchase were in progress the Union, which represented both groups of employees, was informed by Metz that it intended to adhere to the practice followed in numerous prior acquisions [sic] of the routes of other companies, namely that the seller's employees would be regarded as new hires, with seniority dating from the date of acquisition. There is no evidence that the Union interposed any objection.

Fifth, it is uncontroverted that the Omaha plant of Interstate was in deep financial trouble, and faced probable liquidation if a sale could not be consummated.

We start with the legal premise, that seniority rights exist only by virtue of and to the extent provided by a bargaining agreement. *U.A.W. v. Robertshaw Controls, Co.*, 405 F2d 29 (1968); *Interscience Encyclopedia, Inc.* 55 LA 210 (1970).

Of the criteria, which have evolved in dealing with the seniority right of the predecessor's employees in such cases, the Metz employees support the surviving group principle applied by the Company; and the Interstate employees advocate the application of the length of service principle to mitigate the inequity that is the result of tail-ending such employees. In other words, as the successor to Interstate, Metz should recognize their accrued length of service by dovetailing the two seniority lists. The rival positions of the two groups of employees is perfectly understandable. A review of a few arbitral decisions may help to place the issue in perspective.

In *Hubacker Cadillac, Inc.* 57 LA 227 (1971), a case quite similar on its facts with the instant one, Hubacker bought the assets of another dealer. Both were parties to an industry wide contract. Upon transfer of the assets Hubacker did not recognize the vacation benefits accrued by the seller's employees under the Contract. The Union argued that the assets acquired by the seller included the seniority, stability and general productivity of the predecessor company. Arbitrator Updegraff answered this argument as follows:

> "The law seems to be well settled that there is no rule, principle or policy requiring an owner to agree to a substantive contractual provision obligating himself to be liable because of the seniority of the employee earned under another employer unless the later employer expressly obligates itself by an agreement."

There is no evidence of such an agreement with the Union in the instant case.

In a more recent case, *Weber Truck and Warehouse*, 66 LA 1029, the bargaining agreement to which they were

subject contained a provision to the effect that if the employer absorbs the business of another Company or is a party to a merger, the seniority of the employee absorbed or affected shall be determined by mutual agreement between the employer and the Union involved. Failing to reach agreement arbitration was invoked. The Union contended that the employees affected by the acquisition were entitled to benefits accrued under the contract with the former employer but should be end-tailed for job security purposes. The surviving employer considered the employees of the seller as new employees and they were terminated during the probationary period. The arbitrator reached the following conclusion:

> "In the opinion of this Arbitrator and based on the weight of arbitral decision as well as the specific language of the Agreement, it would be improper to impose seniority obtained with one company and the benefits related thereto on another Company and its employees. The affected Davis employees shall have company seniority from the date of their employment by the Company."

The Arbitrator however, awarded the employees benefit rights (in this case vacation fights) accrued as employees of the predecessor.

Another recent case, *Carling National Brewers, Inc.*, 71 LA 476 (1978), involved the closing of a plant (Dillon) acquired three years earlier when Carling consolidated with the National Brewing Company. When the Dillon plant was closed the Company stated there would be openings for nine machinists at its Beltway plant and agreed to fill the openings with the nine most senior machinists at Dillon, integrating them on the seniority list on a one-to-one basis, the "absolute rank" method. The Union which

represented employees at both plants under separate contracts objected on the ground that it would abrogate the seniority rights of Beltway employees. The Contract covering the Beltway plant did not deal with the question of seniority when production at two plants was consolidated, and there was no contract language supporting a merger of seniority lists on a "one-to-one" basis. If applied it would have resulted in a layoff of some Beltway employees. The Arbitrator concluded that under the circumstances the Company could not merge the seniority lists on the basis proposed. In support of his conclusion he cited *U.A.W. vs Robertshaw*, cited above, which held that in the absence of a contract, seniority rights generally do not survive a change in plant location. Although not specifically apposite to the facts in the instant case, the principle applied is not irrelevant.

Otto Milk Co., 51 LA 408 (1967) is an example of a case in which the merging companies were subject to identical contracts which addressed the problem faced here. The labor agreement provided that if the employer sells his entire business, or a part thereof, to another employer, the employees of the seller shall retain one half of their seniority provided they have been in the employ of the seller of at least two years.

A case quite similar in many respects to the instant case is *Associated Brewing Co.* 40 LA 680 (1963). All of the Detroit brewery companies were parties individually to a uniform agreement with three Brewery Workers Locals in Detroit. Pfeiffer Brewing Co. and E & B Brewing Company merged under the name of Associated Brewing Company. Pfeiffer was the larger of the two and E & B was experiencing economic difficulties. With respect to

the status of the employees of the two companies, the three local unions representing brewery workers in Detroit unanimously recommended dovetailing the two groups of employees. A small group of dissident employees adversely affected by the plan objected and the merged company and the Unions agreed to arbitration to afford those employees an opportunity to be heard. The Arbitrator held that dovetailing the lists was the most equitable way since the successor company continued to produce and market the brands of beer produced by Pfeiffer and E & B.

A reference to *Country Belle Cooperative Farmers*, 48 LA 60 involving a plant acquisition will conclude this review of arbitral decisions. The acquiring company proposed to integrate the employees on a one-to-one basis. The union objected, contending the non-union employees of the predecessor must go to the bottom of the list. The contract between the company and the Union was silent on the issue. The Arbitrator pointed out that the purchase involved a going enterprise and in balancing the equities of the two groups the employees of the acquired company should retain one half of their original seniority provided they had been in the employ of the seller for at least two years.

In *N.L.R.B. vs Burns International Security Services*, 406 US 272 (1972) the question was whether in the case of an acquisition of assets or merger of two employers and the same operations are continued, the successor must take over the obligations of the predecessor's bargaining agreement. In overruling the N.L.R.B.'s decision that such obligations survived and bound the successor employer, the Supreme Court stated:

> "Such a duty does not, however, ensue as a matter of law from the mere fact that an employee is doing the same work in the same place with the same employer as his predecessor. . . .
>
> "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, work location, task assignment and nature of supervision. Saddling an employer with the terms and conditions contained in the old collective bargaining contract may make those changes impossible and may discourage and inhibit the transfer of capital."

This case and others make clear that the application of the so-called "successorship" doctrine will depend upon the circumstances of each case.

This Arbitrator has concluded that Metz, as purchaser of most, but not all, of the assets associated with Interstate's plant in Omaha, was not bound under the facts and circumstances to assume or recognize any obligations to Interstate employees under that Company's bargaining agreement. The industry agreement, to which each subscribed made no provision for such an event. Although Metz agreed to recognize benefit rights which employees of Interstate had accrued prior to the transfer, it had informed the Union representing both groups of employees that those employees it might need in the enlarged operations would be recorded as new hires. The Union did not object and seek arbitration of the issue, as the Supreme Court has held it might have done. *John Wiley & Sons vs Livingstone*, 84 S.Ct. 909. Furthermore, this is not a case involving the acquisition of a thriving business, but on the contrary, a failing enterprise. Prospects of continued employment were bleak. Integration of Interstate em-

ployees on the seniority list by dovetailing would have resulted in the layoff of approximately three times as many Metz employees as former Interstate employees. Although it is difficult to achieve complete equity in merging seniority lists under any of the methods that have evolved, the hardship imposed on Metz employees would be severe and disruptive of harmonious labor relations. This Arbitrator is not unmindful of the fact that the surviving-group principle necessarily works severe hardship on the employees of the financially troubled seller but in the absence of the sale the probability of loss of jobs by attrition and ultimate closing of the plant was imminent. Finally, the fact that Metz agreed to assume the obligations attributable to benefit rights accrued by Interstate employees under the contract negates any intention to assume other obligations under the old contract, including the grant of severance pay requested as a minimal remedy. Metz's action was in accord with the Company's prior practice, and not in opposition to industry practice.

Award

The grievance is denied.—

Dated this 7th day of June 1983.

/s/ James A. Doyle
Arbitrator

Supreme Court, U.S.
FILED
JAN 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-928

In The
Supreme Court of the United States
October Term, 1987

METZ BAKING COMPANY and BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #433,

Petitioners,

vs.

SELMAN (JOE) THOMAS, JR., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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No. 87-928

In The

Supreme Court of the United States

October Term, 1987

METZ BAKING COMPANY and BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #433,

Petitioners,

vs.

SELMAN (JOE) THOMAS, JR., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1983 Interstate Brands Corporation ("IBC") and Metz Baking Company ("Metz") both operated baking facilities in Omaha, Nebraska, at separate locations. In January, 1983, the companies reached an agreement relative to the sale of IBC's bakery facility to Metz. The sale

was consummated on February 19, 1983, with Metz taking possession of the plant, equipment and routes on February 21, 1983. Metz operated the former IBC bakery facility without change until early March, 1983. At that time, Metz consolidated all production at the former IBC plant and transferred the employees from its plant to the IBC plant. Metz treated all former IBC employees as new hires as of the date of the sale, February 19, 1983, and layed off all former IBC employees based upon all those employees being placed at the bottom of the seniority list of joint Metz and former IBC employees.

Local 433 of the Bakery, Confectionery and Tobacco Workers Union ("Union") represented the employees at both facilities. Shortly after the lay-offs, a grievance was filed by the former IBC employees, through the Union, alleging that the seniority provisions of the collective bargaining agreement were unfairly and improperly implemented by Metz. The matter proceeded to arbitration before Mr. James A. Doyle[1] on April 26, 1983. The Union took a neutral position. The Arbitrator denied the grievance, which had the result of upholding the action of Metz in laying-off the Respondents.

The collective bargaining agreement in existence for employees at the IBC bakery facility was an industry-wide agreement which applied to separate bargaining units at each plant and each such contract contained identical language. The collective bargaining agreement for the Metz bakery facility and the former IBC bakery facility had

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[1] Dean Emeritus, Creighton University School of Law.

identical language with regard to plant-wide seniority prevailing.

The testimony at the trial of this matter, which occurred in July, 1985, was curiously inconsistent with or non-existent with regard to the facts as found by the Arbitrator. (Appendix D of Petitioners' Brief.)[2]

Mr. Lessman, the Vice President and General Counsel of Metz, testified that around February 19th, he talked to Mr. Clausen, President of the Local 433, regarding the impending sale and indicated to Mr. Clausen that the IBC employees would be treated as new hires and Metz would assign February 19, 1983, as Plaintiffs' new seniority date (Trial Transcript 75:269-70;102:5). Mr. Clausen, however, testified that Mr. Lessman had said that Metz was going to assume the collective bargaining agreement (Trial Transcript 123-25;140); that the Union's position was that Metz had to honor the collective bargaining agreement totally and in all respects (Trial Transcript 131-32); and that if Mr. Lessman had said that Metz was not going to honor the seniority of the IBC employees that the Union would have immediately gone to arbitration (Trial Transcript 314-15). Mr. Clausen then testified that Mr. Lessman did or could have said that Metz was not honoring

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[2] The arbitration award, while in evidence at the trial before the District Court was so admitted solely to evidence the decision of the Arbitrator and was not taken as evidence with regard to any facts found therein. The statement of the case propounded by the Petitioners' relies heavily upon the decision and award of the Arbitrator, Mr. Doyle, rather than referring to the evidence at trial which, for the most part, tended to negate most of the findings of fact of the Arbitrator. The Petitioners err when relying upon the Arbitration award as the basis for the facts in this action.

the seniority of the IBC employees (Trial Transcript 130; 311) but then testified that Mr. Lessman did not say any such thing with regard to seniority (Trial Transcript 313).

Subsequent to the IBC plant being transferred to Metz, it operated without change but for the name on the paycheck of the employees until early March (Trial Transcript 127:90;180:94). No employment applications were ever filled out by any of the employees (Trial Transcript 89-90).

Metz assumed the position that they had hired all former IBC employees on February 19, 1983, and had unilaterally given all such employees a seniority date of February 19, 1983 (Trial Transcript 92;291).

Mr. Lessman contended that the arrangement between Metz and IBC was an asset sale (Trial Transcript 89) although Metz did purchase the routes, tradename and business of IBC (Trial Transcript 292-94).

Mr. Lessman testified that it was Metz' position that it was not bound by the collective bargaining agreement that IBC had with Local 433 under the terms of the purchase agreement with IBC for the sale of the plant (Trial Transcript 79-86;92).

Mr. Clausen testified, again, that the Union's position was that Metz was bound by the terms and conditions of the collective bargaining agreement which IBC had with Local 433 covering the Plaintiffs (Trial Transcript 131-32).

Mr. Clausen testified that the Union went into the arbitration hearing, held on April 26, 1983, with the belief and position that Metz was honoring the collective bargaining agreement which the Union had with IBC and that the

grievance was being submitted on that basis (Trial Transcript 141). The Union's attorney, Mr. Harry Smith, testified at trial that at the arbitration hearing and in his brief to the arbitrator, he acknowledged and argued that the former IBC employees did not receive their seniority when Metz took over the IBC operations (Trial Transcript 172).

Mr. Clausen testified that he and Mr. Harry Smith, the Union's attorney, discussed this case quite frequently and that he believed Mr. Smith knew the Union's position (Trial Transcript 316). Mr. Clausen did not know why Mr. Smith would agree with Mr. Lessman regarding seniority (Trial Transcript 316-17). After the sale was consummated between IBC and Metz, but before the lay-offs, neither the Union nor Metz demanded or requested negotiations (Trial Transcript 91;95;126).

The sale agreement between IBC and Metz provided that IBC would assign the collective bargaining agreement to Metz and that Metz ". . . shall became the successor employer under, and shall use its best efforts to obtain novations with respect to . . ." the collective bargaining agreement.[3] Mr. Lessman testified that he obtained a novation with regard to the collective bargaining agreement from Mr. Clausen (Trial Transcript 87).

Mr. Lessman acknowledged that had Metz assumed all obligations of the IBC collective bargaining agreement with the Union, then upon consolidation of the two plants, the Metz employees would have been layed-off rather than

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[3] Section 10. Transferred Employees, Purchase Agreement between IBC and Metz. See Appendix B to Petitioners' Brief, 7a.

the former IBC employees (Trial Transcript 284;294-95; 304-5).

After the lay-offs had been announced by Metz, the Plaintiffs initiated a grievance (Trial Transcript 134). Mr. Smith wrote it (Trial Transcript 135;249) and it was signed by the employees (Trial Transcript 210). It was then presented to Metz by Mr. Clausen (Trial Transcript 135).

The Union, through Mr. Clausen, advised Metz, via Mr. Lessman, that it was taking a neutral position with regard to the grievance (Trial Transcript 135). The Union took this neutral position based upon the advice of its attorney (Trial Transcript 140-41). Mr. Smith gave this advice very early and without the benefit of any investigation (Trial Transcript 153;156-57;128).

The Union held a meeting of the four Omaha bargaining units in order to discuss the grievance with the Metz and former IBC bargaining unit employees (Trial Transcript 182;136). This meeting was held after the grievance had been filed and before the arbitration. Local 433 had 1,100 to 1,200 members with 14 to 15 separate bargaining units at different plants (Trial Transcript 247). This Union meeting was held on March 12, 1983, and two people were selected from the Metz and IBC groups to testify at the arbitration hearing (Trial Transcript 182).

Mr. James Walker and Mr. William Marsh were selected to represent the former IBC employees. They met with Mr. Harry Smith and Mr. Clausen on March 19, 1983. No discussions were had at the conference regarding Metz changing any seniority dates (Trial Transcript 183;199) or whether Metz assumed the collective bargaining agree-

ment of IBC in total (Trial Transcript 184;200). At the meeting, Mr. Walker asked to see the purchase agreement between Metz and IBC (Trial Transcript 184 85;200). Mr. Marsh did mention the successorship clause in the collective bargaining agreement (Trial Transcript 200). Mr. Clausen indicated that he would have the purchase agreement between Metz and IBC at the arbitration hearing (Trial Transcript 185-86). The meeting lasted ten to fifteen minutes (Trial Transcript 203).

No other contact was had between any of the former IBC employees and the Union until the arbitration hearing, although Mr. Walker had attempted to contact the Union but had received no response (Trial Transcript 186).

Mr. Smith told the former IBC employees that they could say whatever they wished at the arbitration hearing (Trial Transcript 191).

Prior to the arbitration hearing, neither Mr. Clausen nor other officers of the Union, nor even Mr. Smith, reviewed the purchase agreement between IBC and Metz (Trial Transcript 127). Mr. Lessman indicated that Mr. Clausen had requested a copy of the purchase agreement but does not remember when (Trial Transcript 96). Mr. Smith knew of the purchase agreement prior to the arbitration did not review it since he did not consider it any of his business (Trial Transcript 149).

Mr. Lessman testified that prior to the arbitration hearing, he never recalled having any conversations with Mr. Smith regarding the former IBC employees' status or the lay-offs (Trial Transcript 99-100;105-6). He indicated that he seldom dealt with Mr. Smith.

Mr. Smith testified that he had dealt with Mr. Lessman before and that Mr. Lessman's word was good (Trial Transcript 164).

Mr. Smith later testified to a telephone conference which he had with Mr. Lessman wherein Mr. Lessman indicated that the sale between IBC and Metz was an asset sale and that in the conversation Mr. Smith had indicated to Mr. Lessman that the only fair thing to do was to go to arbitration and that the two generally discussed theories of the case (Trial Transcript 165-66).

Thereafter, Mr. Lessman testified, after listening to Mr. Smith, that his memory had been refreshed and that he now recalled, not a telephone conference with Mr. Smith, but a meeting with Mr. Smith in Mr. Smith's office where the parties reviewed cases and discussed theory regarding this matter. He did not recall reviewing the purchase agreement between IBC and Metz with Mr. Smith, at least he was pretty sure he did not do this (Trial Transcript 300; 302; 303-4).

Mr. Clausen attended the arbitration hearing (Trial Transcript 126-27). Mr. Smith called Mr. Lessman to testify but did not call Mr. Clausen to testify (Trial Transcript 178-79). Mr. Lessman testified that the agreement between IBC and Metz was an asset sale (Trial Transcript 98) and that Metz did not assume the collective bargaining agreement which IBC had with the Union (Trial Transcript 111).

Mr. Lessman acknowledged that the only evidence at the arbitration hearing regarding the Plaintiffs' seniority was Mr. Lessman's testimony that under the purchase agreement between IBC and Metz that Metz did not as-

sume the collective bargaining agreement and that the seniority date of the Plaintiffs was February 19, 1983 (Trial Transcript 298).

Mr. Lessman acknowledged that the arbitrator's undisputed facts (Appendix D to Petitioners' Brief) were basically his testimony (Trial Transcript 300).

Mr. Smith testified relative to his labor expertise and the forty-six years of practice as an attorney in the labor relations field (Trial Transcript 142-43).

At the time of the arbitration, Mr. Harry Smith considered the purchase agreement between IBC and Metz to be immaterial because Mr. Lessman had told him that the sale was an asset sale (Trial Transcript 144). Mr. Smith acknowledged reading the purchase agreement *after* the arbitration hearing and testified that it was exactly as Mr. Lessman had testified (Trial Transcript 145). Mr. Smith seemed disinclined to answer questions put to him regarding the Union's position taken at the arbitration hearing (Trial Transcript 145-51). Mr. Smith did acknowledge that the Plaintiffs went to work for Metz as new employees (Trial Transcript 150) and that he had accepted Mr. Lessman's testimony regarding this (Trial Transcript 151).

While Mr. Harry Smith did testify that he argued to the arbitrator that Metz had assumed the IBC collective bargaining agreement (Trial Transcript 162) he also testified that Mr. Lessman's testimony was sufficient and that the actual purchase agreement was not important because the sale between IBC and Metz was an asset sale and that the Respondents were given everything but their seniority (Trial Transcript 163).

Mr. Harry Smith was aware that Metz hired all of the former IBC employees and stated that all Metz would have had to have done was to close the plant for one day, discharge all the people and hire them back as new employees, but Metz did not do this (Trial Transcript 154).

Mr. Smith acknowledged that if Metz had hired all former IBC employees and did not honor the collective bargaining agreement, then Metz could *not* have modified the terms and conditions of the IBC collective bargaining agreement by unilateral action (Trial Transcript 154-55).

Mr. Smith testified that while he did call Mr. Lessman at the arbitration hearing, he did not know that Mr. Lessman was going to attend the hearing and the only purposes for which Mr. Lessman was called was to testify for background information and the terms of the purchase agreement (Trial Transcript 155).

The Arbitrator's Award specifically contained a finding that there was no agreement between IBC and Metz regarding the status of the former IBC employees upon the sale to Metz.

Several of the "facts" of this case stated by the Petitioners in their brief, are, in actuality, findings of fact of the Arbitrator and were never established at trial. Several of these facts are as follows:

1. IBC was operating the plant at a "substantial loss, which warranted a conclusion that if not disposed of, closure of the plant was probable, if not inevitable." (Petitioners' Brief, page 2).

2. IBC therefore initiated negotiations with Metz to sell IBC's existing plant and facilities (Petitioners' Brief, page 2).

3. Even if negotiations had been requested, Metz did not intend to sacrifice the interests of its work force over that of the former IBC employees. (Petitioners' Brief, page 3).

4. Metz, in accordance with past practice, was determined to treat the IBC workers as "new hires" and to "end-tail" them at the bottom of the seniority list, thus protecting the existing Metz work force (Petitioners' Brief, page 3).

5. The sale agreement between IBC and Metz did not contain any provision for IBC workers to obtain seniority over Metz workers after the purchase (Petitioners' Brief, page 3).

6. The collective bargaining agreement did not contain any provision for integration of employees in the event the two work forces were combined (Petitioners' Brief, page 3).

7. None of the IBC employees requested that the sale agreement between IBC and Metz be produced or made a part of the record at the arbitration hearing (Petitioners' Brief, page 5).

8. The collective bargaining agreement did not answer the question of whether workers should be "end-tailed" or "dove-tailed" once integration of the work forces occurred (Petitioners' Brief, page 5).

9. Metz was following its past practice and the practice of the industry in treating the IBC employees as "new hires" (Petitioners' Brief, page 5).

10. The Union's attorney specifically argued to the Arbitrator on behalf of the IBC workers that Metz had

assumed the collective bargaining agreement which the Union had with IBC (Petitioners' Brief, page 6).

Trial in the United States Federal District Court for the District of Nebraska was bifurcated and the issue of liability of the Defendants was first tried to the jury. The jury found in favor of the Plaintiffs and returned a special verdict (Appendix B). Approximately one year later, the Court sustained the motions of both Petitioners herein for judgment notwithstanding the verdict and set aside the jury verdict. Thereafter, this action was appealed to the Eighth Circuit by Respondents herein which reversed the Federal District Court's granting of judgment notwithstanding the verdict for both Petitioners and remanded the case for further proceedings.

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ARGUMENT

I.

THE DECISION OF THE EIGHTH CIRCUIT IS IN ACCORD WITH PRIOR SUPREME COURT PRECEDENT AND THE STATED FEDERAL LABOR RELATIONS POLICIES THAT AN ARBITRATION AWARD IS SUBJECT TO REVIEW ONLY UPON A FINDING THAT A UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION.

The Eighth Circuit's Decision strictly adhered to the principals enunciated in *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and in its opinion stated that Metz was entitled to rely upon the arbitrator's award as a bar to subsequent

litigation of the claim unless the Respondents herein proved that the Union violated its duty of fair representation and that this breach tainted or seriously undermined the integrity of the arbitral process (Petitioners' Brief App. 8A-9A).

The Petitioner Union was found to have violated its duty of fair representation on two separate and distinct bases: the first, in failing to negotiate with Metz at the time of the sale (February 19, 1983); second, in the manner in which it processed the grievance of the Respondents up to and including the arbitration.

The only breach which relates to avoiding the bar of the arbitration award is the breach regarding the handling of the grievance of the Respondents. The Union's breach of its duty of fair representation by failing to negotiate with Metz was not and is not now a basis for challenging the arbitrator's award. The Petitioners consistently characterize the Union's breach with regard to failing to negotiate as insufficient to constitute a violation of the duty of fair representation which would amount to a tainting or undermining of the integrity of the arbitral process. The Petitioners are correct in this conclusion. However, the manner in which the Union handled the grievances of the Respondents up to and including the arbitration certainly evidenced bad faith and dishonesty on the part of the Union and constituted a violation of its duty of fair representation. Once this was established, the only remaining issue was whether or not the Union's breach of its duty of fair representation was such that it tainted or undermined the integrity of the arbitral process. The special verdict (App. B) of the jury in this regard was

clear. The instructions of the Court to the jury regarding this issue (App. A) were specifically in accord with *Vaca v. Sipes,* supra and *Hines v. Anchor Motor Freight, Inc.,* supra.

The manner in which the Union processed the grievance of the Respondents was such that the jury found, as did the Eighth Circuit, that the Union breached its duty of fair representation to the Respondents and that this breach seriously undermined and tainted the arbitration proceeding. The Petitioners, while attempting to argue a legal issue to this Court are, in effect, simply seeking to overturn the findings of fact of the jury. The Petitioners cite as "facts" to this Court the findings of the arbitrator rather than the evidence produced at trial. The Petitioners seem to ignore the fact that the Union President lied to one of the Respondents regarding the security of his job and with regard to having the sale agreement between IBC and Metz at the arbitration hearing; that the Union President and the Union attorney had diametrically opposing positions with regard to the seniority claims of the Respondents; that the Vice President and General Counsel of Metz and the Union attorney testified at trial in an inconsistent manner regarding their conversations and meetings regarding this matter; that the Union took a "neutral position" with regard to the grievance but presented evidence, primarily the testimony of Mr. Lessman, that assured that the Resopndents would fail at the arbitration hearing; that the Union President was never called at the arbitration hearing; and that, finally, the sale agreement between IBC and Metz, which in large measure dictated that seniority rights of the Respondents, was not produced at the arbitration hearing.

These relevant facts at the trial of this action supported the findings made by the trier of fact. In reviewing these findings, when one compares the arbitrator's decision to the evidence at trial, inclusive of the sale agreement between IBC and Metz, it can hardly be said that there was a lack of evidence on the part of the Respondents to prove that the Union breached its duty of fair representation and that this breach tainted and undermined the arbitration hearing.

The decision of the Eighth Circuit was in accord with the prior decisions of this Court and the federal policy of labor relations regarding arbitral decisions. On infrequent occasions, such as this, the arbitrator's decision is subject to review if that decision is the product of the Union's breach of its duty of fair representation which results in essential facts being withheld from the arbitrator and, thereby, taints and undermines the integrity of the arbitration process.

II.

THE DECISION OF THE EIGHTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS REGARDING WHAT CONSTITUTES A VIOLATION OF THE DUTY OF FAIR REPRESENTATION AND WHAT IS REQUIRED BEFORE A PRIOR ARBITRAL AWARD IS VACATED.

Once again the Petitioners argue to this Court that the Union's breach of its duty of fair representation with regard to failing to negotiate with Metz cannot rise to a level where it can be found to taint or undermine the arbitral process. The Petitioners are, once again, correct. The Eighth Circuit in its decision did not so find. There

is no conflict between the Eighth Circuit and any other Circuit with regard to this issue.

The Petitioners have cited to this Court *Wood v. International Brotherhood of Teamsters,* 807 F.2d 493 (6th Cir. 1986) cert. den. 107 S.Ct. 3232 (1987) which dealt with the issue of whether or not a Union breached its duty of fair representation by failing to negotiate with the former employer, the new employer having been dismissed from the law suit. There is no conflict between *Wood* and in this action since, in this case, the Union's breach of its duty of fair representation which was found to have tainted and undermined the arbitral process related to the Union's handling of the grievance of the Respondents and not the Union's failure to negotiate with Metz when it purchased the business of IBC.

The Petitioners cite *Morris v. Werner-Continental, Inc.,* 466 F.2d 185 (6th Cir.) cert. den. 411 U.S. 965 (1972) as supportive of their position. Unfortunately, in *Morris,* supra, there simply was no finding that the Union breached its duty of fair representation and hence this case is not supportive of Petitioners' position. *Morris,* supra, is simply not on point.

In citing *Deboles v. Trans World Airlines, Inc.,* 662 F.2d 1005 (3d Cir.) cert. den. 434 U.S. 837 (1977), the Petitioners once again raise the issue of failing to negotiate as the basis upon which the Eighth Circuit found that the arbitral process was tainted and undermined. This was not the basis for the Eighth Circuit's decision in this action and, therefore, *Deboles,* supra, is not applicable.

In citing the Ninth Circuit decision of *Castelli v. Douglas Aircraft Co.,* 752 F.2d 1480 (9th Cir. 1985) the Peti-

tioners are merely arguing a question of fact, once again, relative to whether or not the Union's actions in this case amounted to mere negligence or, conversely, constituted a breach of the Union's duty. Considering the evidence at trial, the instructions to the jury and the jury's findings in this regard, this issue is moot.

In *Acri v. International Association of Machinists,* 781 F.2d 1393 (9th Cir.) cert. den. 107 S.Ct. 73 (1986) the Petitioners are once again arguing a "failure-to-bargain" case. Since the Union's failure to negotiate with Metz, which was found to be a breach of its duty of fair representation, was not the basis upon which the arbitration award was found to have been tainted or undermined, this argument is simply not applicable.

The conflicts which the Petitioners suggest exist between the Eighth Circuit and that of the Third, Fourth, Sixth, Seventh and Ninth Circuits are, in actuality, nonexistent and serve as no basis for the issuance of the writ prayed for herein.

CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should be denied herein.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al., Plaintiffs, vs. BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #433, et al., Defendants.	CV 83-0-652 COURT'S CHARGE TO THE JURY (Filed July 16, 1985)

• • •

Jury instructions numbers 1 through 7 and 12 through 25 intentionally omitted by counsel for the Respondents.

INSTRUCTION NO. 8

Defendant Union acted as the exclusive collective bargaining representative for the production employees of Interstate Brands Corporation at its plant in Omaha, Nebraska, including plaintiffs in this case, and the production employees of defendant Metz at its plants in Omaha, Nebraska. As the collective bargaining representative of both groups of employees, defendant Union was obligated by law to represent both groups of employees fairly in its dealing with their employers in regard to their rights under their collective bargaining agreements. This obligation is known as defendant Union's duty of fair representation.

A wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The duty of a union is to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary or perfunctory conduct. A breach of this duty occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, perfunctory, discriminatory, or in bad faith.

"Perfunctory" means without concern or solicitude, indifferent.

INSTRUCTION NO. 9

In order for the plaintiffs to prevail on their claim against the Union for breach of its duty to fairly represent the plaintiffs by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz's purchase of the Interstate Brands Corporation's Omaha facility, the plaintiffs must prove by a preponderance of the evidence the following elements:

First, that by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz's purchase of the Interstate Brands Corporation's Omaha facility:

a. The defendant Union acted with hostility or in a discriminatory manner; *or*

b. The defendant Union acted dishonestly or in bad faith; *or*

c. The defendant Union acted arbitrarily or in a perfunctory manner.

Honest, but mistaken, conduct may not be considered arbitrary, discriminatory or bad faith conduct. Proof of mere negligence, poor judgment or ineptitude, is not sufficient to justify a finding that the Union breached its duty of fair representation. However, evidence that the Union acted without concern may support a finding that the Union acted in an arbitrary or perfunctory manner.

INSTRUCTION NO. 9 PAGE 2

If you find that the plaintiffs have proven by a preponderance of the evidence that the Union breached its duty of fair representation to the plaintiffs by failing to negotiate, then you must proceed to determine whether the plaintiffs' interests were prejudiced by the breach of duty.

In order to prevail on the issue that the interests of the plaintiffs were prejudiced by the breach of duty, the plaintiffs must prove by a preponderance of the evidence that had the Union negotiated the defendant Metz would not have laid off the plaintiffs in March, 1983.

Now, in summary, if you find after applying these instructions of law that the plaintiffs have not proven by a preponderance of the evidence that (1) the Union breached its duty of fair representation to the plaintiffs by failing to negotiate and (2) that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of the defendant Union and against the plaintiffs' claim that the Union breached its duty of fair representation to the plaintiffs by failing to negotiate.

On the other hand if you find from a preponderance of the evidence that the plaintiffs have proven that the Union

breached its duty of fair representation to the plaintiffs by failing to negotiate and that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of the plaintiffs and against the defendant Union on plaintiffs claim that the Union breached its duty of fair representation by failing to negotiate.

INSTRUCTION NO. 10

In addition, the plaintiffs allege the defendant Union committed a breach of its duty of fair representation toward the plaintiffs by the position taken between the seniority claims of plaintiffs and those of defendant Metz' employees in processing plaintiffs' grievance and/or by not presenting a copy of a sales contract between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance.

In order for the plaintiffs to prevail on their claim against the Union for breach of its duty to fairly represent the plaintiffs under either or both of these theories, the plaintiffs must prove by a preponderance of the evidence the following elements:

First, that in the investigating and processing of the plaintiffs' seniority claims and grievances:

a. The defendant Union acted with hostility or in a discriminatory manner; *or*

b. The defendant Union acted dishonestly or in bad faith; *or*

c. The defendant Union acted arbitrarily or in a perfunctory manner.

As you were instructed before, honest, but mistaken, conduct may not be considered arbitrary, discriminatory or

bad faith conduct. Proof of mere negligence, poor judgment or ineptitude, is not sufficient to justify a finding that the Union breached its duty of fair representation. However, evidence that the Union acted without concern or

INSTRUCTION NO. 10 PAGE 2

solicitude or gave plaintiffs' claims and grievance only cursory attention may support a finding that the Union acted in an arbitrary or perfunctory manner.

If you find that the plaintiffs have proven by a preponderance of the evidence that the Union breached its duty of fair representation to the plaintiffs in the investigation and processing of the plaintiffs' seniority claims and grievances, then you must proceed to determine whether the plaintiffs' interests were prejudiced by the breach of duty.

In order to prevail on the issue that the interests of the plaintiffs were prejudiced by the breach of duty, the plaintiffs must prove by a preponderance of the evidence that the conduct of the defendant Union tainted, that is seriously undermined, the integrity of the arbitration process.

Now, in summary, if you find after applying these instructions of law that the plaintiffs have not proven by a preponderance of the evidence that (1) the Union breached its duty of fair representation to the plaintiffs in the investigating and processing of the plaintiffs' seniority claims and grievances and (2) that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of defendant Union and against the plaintiffs on plaintiffs' claim that the Union

breached its duty of fair representation to the plaintiffs by the position taken and/or by not presenting a copy of the sales contract.

INSTRUCTION NO. 10 PAGE 3

On the other hand if you find from a preponderance of the evidence that the plaintiffs have proven that the Union breached its duty of fair representation to the plaintiffs and that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you will proceed in your deliberations to consider the plaintiffs' claim against defendant Metz for breach of the Collective Bargaining Agreement.

In this regard you are instructed that a decision by an arbitrator in a labor arbitration proceeding is final and binding unless the Union breached its duty of fair representation to the prejudice of the plaintiffs as earlier explained in this instruction.

INSTRUCTION NO. 11

You are instructed that the failure of defendant Union to negotiate with defendant Metz in regard to plaintiffs' job seniority upon defendant Metz' purchase of the Interstate Brands Corporation's Omaha facility, or, the position taken by defendant Union as to the seniority claims of plaintiffs and those of defendant Metz' employees in the processing of plaintiffs' grievance do not alone comprise a breach of defendant Union's duty of fair representation toward plaintiffs. Rather, plaintiffs must further establish that those actions of defendant Union were done with hostility toward plaintiffs, discriminated against them, were

done in bad faith or were arbitrary or perfunctory under all the facts and circumstances. And, plaintiffs must also show that the conduct of the defendant Union prejudiced plaintiffs' interests.

You are further instructed that defendant Union's failure to present a copy of a sales agreement between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance does not by itself comprise a breach of defendant Union's duty of fair representation toward plaintiffs. Rather, plaintiffs must further establish that such action of defendant Union was done with hostility toward plaintiffs, discriminated against them, was done in bad faith or was arbitrary or perfunctory under all the facts and circumstances. And, plaintiffs must also show that the conduct of the defendant Union prejudiced plaintiffs interests.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al,	)	CV 83-0-652
Plaintiffs,	)	SPECIAL VERDICT
vs.	)	
BAKER, CONFECTIONERY AND TOBACCO WORKERS UNION, LOCAL #433, et al.,	)	(Filed July 16, 1985)
Defendants.	)	

QUESTION NO. 1: Do you find from a preponderance of the evidence that defendant Union breached its duty of fair representation with respect to the plaintiffs by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz' purchase of the Interstate Brands Coropration's Omaha facility?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 2. IF YOUR ANSWER IS "NO", GO TO QUESTION 3.

QUESTION NO. 2: Do you find from a preponderance of the evidence that had the Union negotiated in regard to their job security upon defendant Metz' purchase of Interstate Brands Corporation's Omaha facility the defendant Metz would not have laid off the plaintiffs in March, 1983?

ANSWER: "YES" or "NO" ANSWER: Yes

GO ON TO QUESTION 3.

QUESTION NO. 3: Do you find from a preponderance of the evidence that the Union breached its duty of fair representation with respect to the plaintiffs by the position taken by the Union with regard to the seniority claims of the plaintiffs and those of defendant Metz' previous employees in processing plaintiffs' grievance *and/or* by not presenting a copy of a sales contract between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 4. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 4: Do you find from a preponderance of the evidence that the conduct of the defendant Union tainted, that is seriously undermined, the integrity of the arbitration process.

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 5. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 5: Do you find from a preponderance of the evidence that defendant Metz expressly agreed to be bound to the seniority provisions of the Collective Bargaining Agreement in the sales agreement executed between defendant Metz and Interstate Brands Corporation?

ANSWER: "YES" or "NO" ANSWER: Yes

GO ON TO QUESTION 6.

QUESTION NO. 6: Do you find from a preponderance of the evidence that defendant Metz impliedly assumed the seniority provisions of the Collective Bargaining Agreement through its actions?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES" TO EITHER OR BOTH OF QUESTIONS 5 OR 6, GO TO QUESTION 7. IF YOUR ANSWER IS "NO" TO *BOTH* QUESTIONS 5 *AND* 6, YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 7: Do you find from a preponderance of the evidence that defendant Metz breached the seniority provisions of the Collective Bargaining Agreement?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 8. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 8: Do you find from a preponderance of the evidence that the plaintiffs were laid off as a result of the breach of the Collective Bargaining Agreement?

ANSWER: "YES" or "NO" ANSWER: Yes

YOUR FOREPERSON IS TO NOW DATE AND SIGN THIS SPECIAI VERDICT.

DATED this 16th day of July, 1985.

/s/ Ellen L. Zurcher
FOREPERSON

FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-928

In The
Supreme Court of the United States
October Term, 1987

METZ BAKING COMPANY and BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #433,
Petitioners,

vs.

SELMAN (JOE) THOMAS, JR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I.

For Respondents to vacate the arbitrator's Decision and Award in this case they must demonstrate that the arbitral award was "tainted" or "seriously undermined" by the Union's breach of its duty of fair representation. Absent such a "taint", the arbitral award must be enforced.

Respondents have advanced two claims alleging violation of the duty of fair representation. First, Respondents contend that the Union failed to negotiate once it learned of possible layoffs. Second, Respondents argue that the arbitrator was not given a collateral Sales Agreement and the Union's failure to present this Agreement at the arbitration violated its duty of fair representation.

Respondents now concede in their Brief in Opposition that the record does not establish a "taint" or an undermining of the arbitral process with respect to their claims concerning the failure to negotiate.

This concession demonstrates the frailty of the rationale for vacating the arbitral award. Respondents' only claim of "taint" or undermining of the arbitral process is that the Sales Agreement was not admitted into evidence at the arbitration. Yet this Court has recently said in *United Paper Workers International Union AFL-CIO v. Misco, Inc.*, 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987) (No. 86-651), that the courts have no business weighing the merits of disputes and thereby vacating an arbitral award if the arbitration award draws its essence from the collective bargaining agreements. 56 U.S.L.W. at 4014. In the present case the collective bargaining agreements

were before the arbitrator and his decision specifically relied upon them.

II.

Respondents also contend that ten "facts" discussed in Petitioners' Statement of the Case were taken from the arbitrator's decision and were not supported by the record of trial. (Respondents' Brief, pages 10-12)

The "facts" in question were indeed taken from the arbitrator's decision and were clearly cited accordingly. Petitioners have contended throughout that the arbitrator's decision should be reinstated. In particular, Petitioners have urged that one of the reasons the arbitrator's decision should be reinstated is that the parties agreed to place this dispute before an experienced arbitrator who has an understanding of the economic reality of labor relations disputes. As this Court recently stated in the *Misco* case, *supra*: "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, *it is the arbitrator's view of the facts* and of the meaning of the contract *that they have agreed to accept.* 56 U.S.L.W. at 4014 (emphasis supplied).

The first two "facts" cited by Respondents (that the IBC plant was operating at a loss which made its closure "probable" if not inevitable and that IBC therefore initiated negotiations for sale) were taken from the arbitrator's findings. The losses sustained by IBC prior to sale were evidenced by Exhibit 112 (statement of IBC income) which was introduced both at the arbitration and at the trial. These "facts" form part of the economic background of this dispute. Together with the remain-

ing eight "facts" discussed *infra*, they are material to a consideration of the merits of the arbitrator's decision and thus were properly included in Petitioners' Statement of the Case. Supreme Court Rule 21.1(g)

The remaining eight "facts" do appear in the Record of Proceedings as evidenced by their citation from the arbitrator's Decision and Award. However, these facts also appear in the decisions of the District Court and of the Eighth Circuit Court of Appeals and are clearly properly included in the Statement of the Case.[1]

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[1] Since the Court does not have the Record of Proceedings below, Petitioners have with few exceptions confined their citations to matters appearing in the decisions below. The remaining eight "facts" as stated by Respondents are hereafter quoted from pages 10-12 of Respondents' Brief. These "facts" are followed by supporting quotations from the opinions of the District Court or Eighth Circuit (as found in the Appendix to the Petition):

"3. Even if negotiations had been requested, Metz did not intend to sacrifice the interests of its work force over that of the former IBC employees." *See* District Court's opinion: "The evidence was insufficient for a jury to reasonably find that negotiations between Metz and the Union would have affected the layoffs. The only testimony on point indicated that Metz intended to keep its own employees on the job when it transferred the Nicholas Street operation to the Leavenworth Street facility . . . Metz had no reason or inclination to agree to handle the layoffs in any other way." (App. 36a-37a).

"4. Metz, in accordance with its past practice, was determined to treat the IBC workers as "new hires" and to "endtail" them at the bottom of the seniority list, thus protecting the existing Metz work force." *See* citation to District Court's opinion following "fact" 3, *supra*. *See also*, Eighth Circuit opinion at App. 15a-16a, wherein the Eighth Circuit in summarizing the testimony of Lessman at the arbitration wrote: "Metz's past practice had been to treat "acquired" employees just as it treated the former IBC workers as new hires, and Metz had no intention of changing that practice with the IBC transaction."

(Continued on following page)

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"5. The Sales Agreement between IBC and Metz did not contain any provision for IBC workers to obtain seniority over Metz workers after the purchase." See District Court decision: "Such a conclusion finds further support in the undisputed evidence that the collective bargaining agreement did not contain any language regarding how to merge the Metz and IBC seniority lists. And the Sales Agreement, at most, obligated Metz to assume the IBC contract in full." (App. 46a) *See also,* Judge Henley's concurring and dissenting opinion in the Eighth Circuit where he wrote: "[I]t [the Sales Agreement] nowhere provides that the IBC employees would be dovetailed with the Metz employees or that they would not be endtailed. . ." (App. 25a)

"6. The collective bargaining agreement did not contain any provision for integration of employees in the event the two work forces were combined." *See* District Court's decision, "Arbitration was necessary to determine the proper interpretation of the seniority provisions since the [collective bargaining] contract was silent on the subject of assembling one work force from two bargaining units." (App. 34a) *See also* the District Court's opinion at App. 46a which referred to: "[T]he undisputed evidence that the collective bargaining agreement did not contain any language regarding how to merge the Metz and IBC seniority lists."

"7. None of the IBC employees requested that the Sales Agreement between IBC and Metz be produced or made a part of the record at the arbitration hearing." *See* District Court's opinion at App. 38a: "At no time during the [arbitration] hearing did the Union attorney restrict what any witness from either group said. None of the IBC witnesses testified at the arbitration hearing regarding the absence of or the need for production of the Sales Agreements at the hearing . . ."

"8. The collective bargaining agreement did not answer the question of whether workers should be "endtailed" or "dovetailed" once integration of the work forces occurred." *See* citations to the District Court's opinion following "fact" 6, *supra*.

"9. Metz was following its past practice and the practice of the industry in treating the IBC employees as 'new hires.'" *See* citation to the Eighth Circuit's opinion following "fact" 4, *supra*.

(Continued on following page)

III.

Respondents further argue that several of the cases cited by Petitioners with respect to conflict in the Circuits are not in point. Respondents' analysis fails to encompass all of the cases cited by Petitioners. *See, Self v. Drivers, Chauffeurs, Warehousemen, Etc.*, 620 F.2d 439 (4th Cir. 1980); *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir.), *cert. denied*, 106 S. Ct. 3282 (1986); and *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981). Nor does it answer the legal argument made that the Eighth Circuit has adopted a new more relaxed standard as to what constitutes a violation of the duty of fair representation sufficient to vacate an arbitral award.

A careful reading of the cases supposedly distinguished by Respondents demonstrates they are on point and were properly cited. A case in point is the decision in *Wood v. International Brotherhood of Teamsters*, 807 F.2d 493 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 3232 (1987). Respondents' characterization that this is merely another failure to negotiate case is incorrect.

In the *Wood* case the District Court's denial of Defendant Kroger's motion for judgment as a matter of law was reversed by the Sixth Circuit Court because: "there was no evidence that any breach of the Union of its duty

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"10. The Union's attorney specifically argued to the arbitrator on behalf of the IBC workers that Metz had assumed the collecting bargaining agreement which the Union had with IBC." See District Court's opinion at App. 46a, note 2: "In its brief to the arbitrator, the Union did argue that Metz had assumed the collective bargaining agreement."

of fair representation tainted the arbitrator's decision." 807 F.2d at 500. Several of the alleged grounds for the Union's failure of its duty of fair representation stemmed from the Union's conduct at the arbitration—including the Union's objections to Plaintiffs' evidence and testimony as well as an alleged "signal" to the arbitrator that the Union did not desire to win the case. 807 F.2d at 500-502.

Both the *Wood* case and the recently decided *Misco* case discuss the importance of preserving the arbitrator's decision. Although Respondents have argued throughout that the Sales Agreement was not submitted to the arbitrator, the *Wood* case makes plain that: "A court may not review the merits of an arbitration decision, even when the basis for the decision is ambiguous, as long as the award draws its essence from the bargaining agreement." 807 F.2d at 500, citing *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598-99 (1960). And in *Misco* this Court held: "The Courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." 56 U.S.L.W. at 4013. Even where an appellate court is convinced that the arbitrator committed "serious error", this error in the absence of "fraud" or the "arbitrator's dishonesty" does not suffice to overturn the arbitrator's decision, "as long as the arbitrator is even arguably construing or applying the [collective bargaining] contract . . ." 56 U.S.L.W. at 4014.

———o———

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

DATED THIS 18th day of January, 1988.

Respectfully submitted,

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